

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

HEADWATER RESEARCH, LLC,) (
 PLAINTIFF,) (
VS.) (
VERIZON COMMUNICATIONS INC.,) (
INC., ET AL.,) (
 DEFENDANTS.) (
 9:00 A.M.

HEADWATER RESEARCH, LLC,) (
 PLAINTIFF,) (
VS.) (
T-MOBILE US, INC., ET AL.,) (
 DEFENDANTS.) (
 9:00 A.M.

PRETRIAL HEARING
BEFORE THE HONORABLE ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE

FOR THE PLAINTIFF: Mr. Marc Fenster
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24 (Proceedings recorded by mechanical stenography, transcript
25 produced on a CAT system.)

09:00:28 1 COURT SECURITY OFFICER: All rise.

09:00:28 2 THE COURT: Good morning. Please be seated.

09:00:31 3 For the record, we're here for the pretrial

09:00:36 4 conference in Headwater Research versus Verizon

09:00:42 5 Communications, which is 2:23-352 on our docket, and

09:00:49 6 Headwater Research versus T-Mobile USA, Inc., et al., which

09:00:56 7 is Case No. 2:23-379 on our docket.

09:01:00 8 Would counsel state their appearances for the

09:01:02 9 record?

09:01:02 10 MS. FAIR: Good morning, Your Honor. Andrea Fair

09:01:04 11 on behalf of Headwater. I'm joined today by Mr. Marc

09:01:07 12 Fenster, Mr. Reza Mirzaie.

09:01:07 13 MR. MIRZAIE: Morning.

09:01:08 14 MS. FAIR: Mr. Kristopher Davis, Mr. Adam Hoffman,

09:01:12 15 Mr. Jason Wietholter, Mr. Philip Wang, and Mr. Dale Chang.

09:01:19 16 And we're ready to proceed.

09:01:20 17 THE COURT: All right. Thank you, Ms. Fair.

09:01:25 18 MR. GORHAM: Good morning, Your Honor. Tom Gorham

09:01:26 19 on behalf of Defendant T-Mobile. With me here this morning

09:01:30 20 on behalf of Verizon is Mr. Deron Dacus. We, again, have a

09:01:35 21 number of Gibson Dunn lawyers appearing on behalf of both

09:01:39 22 Verizon and T-Mobile this morning. We have Ms. Kate

09:01:42 23 Dominguez, Mr. Brian Rosenthal.

09:01:42 24 MR. ROSENTHAL: Good morning.

09:01:44 25 MR. GORHAM: Mr. Josh Krevitt.

09:01:44 1 MR. KREVITT: Good morning.

09:01:45 2 MR. GORHAM: Mr. Charlie Sim.

09:01:45 3 MR. SIM: Good morning.

09:01:46 4 MR. GORHAM: Mr. Brian Rosenthal, Mr. Rob Vincent,
09:01:50 5 and Ms. Hannah Bedard -- excuse me, Andrew Robb, and
09:01:54 6 Ms. Hannah Bedard. And we're ready to proceed, Your Honor.

09:01:57 7 THE COURT: All right. Thank you, Mr. Gorham.

09:02:09 8 As counsel know, both of these cases are on the
09:02:12 9 June 23 trial docket for Judge Gilstrap. The Court has
09:02:18 10 designated the Verizon case ahead of the T-Mobile case.
09:02:24 11 Both of them are currently behind the Empire versus Samsung
09:02:32 12 case, but obviously with the Verizon case second on that
09:02:41 13 June 23 docket, there's certainly an excellent chance it'll
09:02:45 14 be reached at that time.

09:02:46 15 I have looked over the record in the case,
09:02:56 16 including the recent representation that the Plaintiff was
09:03:01 17 going to reduce the claims down to four claims for trial.
09:03:09 18 With that and the other information in the pretrial order
09:03:12 19 about the witnesses and the like, I think that 11 hours per
09:03:16 20 side will be sufficient for the case. But if either party
09:03:23 21 wants to offer argument on that, this would be the time to
09:03:28 22 hear it.

09:03:32 23 Mr. Fenster?

09:03:34 24 MR. FENSTER: Good morning, Your Honor. I would
09:03:39 25 request the Court's consideration for 12 hours. And the

09:03:43 1 basic reason is while we have four claims at issue and one
09:03:49 2 Defendant, this case involves, for the '541 and the '613
09:03:54 3 patent, multiple products. And so we're accusing for each
09:04:00 4 of the '541 and '613 patents phones from Apple, Samsung,
09:04:07 5 and Motorola, at least.

09:04:11 6 So there are -- there's a whole host of products,
09:04:16 7 both Android and iOS, that will require some going
09:04:21 8 through -- you know, some time to get through. And so
09:04:24 9 that's why we'd request 12.

09:04:26 10 THE COURT: All right. Thank you, Mr. Fenster.

09:04:31 11 MR. ROSENTHAL: Your Honor, Brian Rosenthal on
09:04:32 12 behalf of the Defendants.

09:04:33 13 I think that if the case remains the size that it
09:04:37 14 is now, we would join in that request. And by that, I mean
09:04:43 15 there are some issues -- I hope we can discuss some of
09:04:46 16 those issues later today, but there are some issues that we
09:04:48 17 think are rifle shots and actually do substantially reduce
09:04:53 18 the scope of the case. For instance, knocking out a
09:04:56 19 patent, knocking out products.

09:04:58 20 If the case remains the size that it is today, we
09:05:02 21 would join in the Plaintiff's request for 12 hours a side
09:05:05 22 if the Court's amenable to that. I do think that there are
09:05:08 23 some complications.

09:05:10 24 We could, of course, you know, revisit that
09:05:11 25 question after the summary judgment motions are disposed

09:05:14 1 of. I think that will bear a little bit on how complex the
09:05:18 2 case is.

09:05:18 3 THE COURT: All right. Thank you, Mr. Rosenthal.

09:05:21 4 I will take those arguments into account and
09:05:26 5 consider that further as we work through the other issues
09:05:29 6 in the case. But at this point, I'll leave it at 11 hours
09:05:36 7 per side.

09:05:37 8 On June 23, the Court will take up jury selection
09:05:45 9 first on that Monday. There'll be 30 minutes per side
09:05:50 10 allocated for voir dire, the first up to three minutes of
09:05:55 11 which can be devoted to a non-argumentative barebones
09:06:01 12 overview of what's at issue in the case. I would stress
09:06:05 13 the non-argumentative part of that description.

09:06:09 14 At the end of that process, eight jurors will be
09:06:14 15 selected. There will be four peremptory challenges per
09:06:18 16 side, which are exercised in a written blind simultaneous
09:06:24 17 fashion, meaning that both sides turn in their written
09:06:28 18 peremptory challenges at the same time.

09:06:31 19 After the peremptory challenges, the Court will
09:06:35 20 take up the challenges -- or, I'm sorry, before the
09:06:40 21 peremptory challenges, the Court will take up the
09:06:43 22 challenges for cause on the record that's been established.

09:06:49 23 Opening statements will proceed thereafter, 30
09:06:54 24 minutes per side.

09:06:58 25 Closing arguments, the parties should expect 40

09:07:02 1 minutes per side, although you can take that matter up with
09:07:06 2 Judge Gilstrap, and it'll depend a little bit on where the
09:07:16 3 case is in the daily schedule as to whether there can be
09:07:20 4 more time.

09:07:20 5 Plaintiffs are authorized to withhold up to half
09:07:21 6 of their time for rebuttal, but it has to be less than half
09:07:25 7 actually.

09:07:25 8 As you know, Judge Gilstrap will plan to be in
09:07:31 9 chambers daily at 7:30. If there are issues that affect
09:07:37 10 the trial that starts that morning, I think the pretrial
09:07:43 11 order that the parties have agreed to has a proper -- a
09:07:54 12 proper protocol for disposition of the -- of any disputes
09:08:02 13 that arise during it.

09:08:04 14 There were a few issues in the pretrial order that
09:08:07 15 I think were not agreed to. I'm trying to -- I think the
09:08:27 16 agreement in the pretrial order includes notifying the
09:08:29 17 Court of existing disputes by an email to the designated
09:08:35 18 law clerk by 10:00 p.m. that night. You may have agreed to
09:08:39 19 an earlier time. If so, that's, of course, fine.

09:08:42 20 The one thing I would add to your agreement is
09:08:50 21 that in addition to notifying the Court by that 9:00 or
09:08:55 22 10:00 p.m., depending on what your agreement was, you
09:09:01 23 should plan to have available for Judge Gilstrap the
09:09:03 24 following morning when you're going to present the dispute
09:09:08 25 a jointly prepared three-ring binder that has a copy of the

09:09:13 1 demonstrative, for instance, if that's what the issue is,
09:09:16 2 or if it's an exhibit, a copy of that -- a short narrative
09:09:23 3 from each side, roughly half a page, setting out what the
09:09:27 4 dispute is in preparation for a conference with the Judge
09:09:36 5 at 7:30 or thereabouts.

09:09:39 6 The plan will be for the jury to report around
09:09:42 7 8:30 daily.

09:09:47 8 Lunch is provided for the jury so that the lunch
09:09:50 9 break can be kept short to roughly 45 minutes.

09:09:56 10 The Court will plan to adjourn by around 6:00 p.m.
09:10:02 11 each day in order to accomplish the completion of the trial
09:10:09 12 in that week.

09:10:13 13 If there are disputes about deposition
09:10:18 14 designations, we'll try and resolve any for the first day
09:10:24 15 of trial, if there are any, during the pretrial process,
09:10:34 16 but the situation -- the protocol that you agreed to in the
09:10:37 17 pretrial order is acceptable for resolution of the
09:10:45 18 disputes, but I think the parties had a disagreement about
09:10:51 19 when they need to make those issues known.

09:10:57 20 There was in Paragraph 11 and 12 of the pretrial
09:11:04 21 order a section on the trial management procedures. There
09:11:11 22 was a dispute about whether 12:30 p.m. two days before or
09:11:19 23 6:30 p.m. three days before would work. I think that the
09:11:29 24 Court has in the past adopted the 12:30 two days before.
09:11:36 25 And I see no reason not to adopt that this time.

09:11:40 1 If the Defendant wants to offer some argument in
09:11:43 2 support of the 6:30 deadline three days before, I'll be
09:11:51 3 happy to hear it. But, otherwise, I'll go with what we've
09:11:55 4 used before.

09:11:55 5 Mr. Rosenthal?

09:11:56 6 MR. ROSENTHAL: Your Honor, we'll live with that.
09:11:57 7 Thank you, Your Honor.

09:11:58 8 THE COURT: All right. Then with that
09:12:06 9 clarification, the pretrial order will be adopted.

09:12:16 10 Mr. Rosenthal, I note that there was a request for
09:12:19 11 a separate provision regarding the use of errata when a
09:12:26 12 deposition is being offered.

09:12:30 13 Do you want to provide your argument on that, or
09:12:32 14 is that something that has been resolved?

09:12:34 15 MR. ROSENTHAL: Your Honor, it has not been
09:12:37 16 resolved. I think it's a fairly ministerial issue.
09:12:42 17 Mr. Vincent, if you don't mind, can just briefly address
09:12:46 18 what the issue is.

09:12:47 19 THE COURT: All right.

09:12:47 20 MR. ROSENTHAL: Thank you.

09:12:48 21 MR. VINCENT: Your Honor. Robert Vincent for
09:12:53 22 Defendants.

09:12:53 23 The issue is straightforward. There are
09:12:55 24 depositions and deposition designations to be played in
09:12:58 25 this case. Those depositions, errata were made through the

09:13:03 1 normal errata process that bear on the testimony that
09:13:07 2 Headwater wants to designate in the trial.

09:13:10 3 For completeness, we believe that the errata
09:13:13 4 should be read to the jury, to the extent it bears on the
09:13:16 5 testimony that Headwater has designated. That's why we
09:13:19 6 have an errata process in the deposition process. That's
09:13:23 7 why we have those. And so for completeness, to get the
09:13:28 8 complete testimony and context, the errata are necessary to
09:13:34 9 be read, again, to the extent that Headwater wants to
09:13:37 10 designate testimony that relates to that errata.

09:13:40 11 THE COURT: All right. And, Mr. Vincent, are you
09:13:43 12 familiar with the errata that are at issue in these
09:13:48 13 depositions? Are -- is it simply what you would consider
09:13:53 14 the correction of a typo, or is it to do with the witness
09:13:59 15 wanting to clarify or change their answer in some way?

09:14:05 16 MR. ROSENTHAL: I think that can be corrected. If
09:14:09 17 wrong -- I think there is a -- there are typos, and there
09:14:11 18 are also, you know, clarifications or explanations of
09:14:16 19 testimony.

09:14:17 20 Again, I don't have that errata in front of me
09:14:19 21 right now, but in -- but I think it involves -- not simply,
09:14:25 22 you know, a misspelled word, but it does go to what the
09:14:29 23 witness testified as their testimony under oath. And,
09:14:33 24 again, that's what the errata process is for, so that the
09:14:36 25 witness can control the testimony that they provided under

09:14:39 1 oath.

09:14:40 2 And if Headwater has specific objections to
09:14:43 3 specific errata, then they can raise those, but my
09:14:48 4 understanding that this was a global objection to reading
09:14:52 5 errata at all in the -- for witness designations.

09:14:57 6 THE COURT: It seems to me that perhaps the best
09:15:01 7 way to handle this is like an objection in the designated
09:15:08 8 testimony. And if the other side -- whichever side is
09:15:16 9 wanting to use the errata, if the other side feels that
09:15:21 10 it's a misuse of the errata process, then I think probably
09:15:27 11 the best way is to meet and confer about that and then
09:15:31 12 raise it as an objection during the deposition designation
09:15:38 13 process.

09:15:39 14 Do you have any reason to think it should be done
09:15:44 15 differently?

09:15:45 16 MR. VINCENT: No, Your Honor, that's the process
09:15:47 17 that we would propose.

09:15:48 18 THE COURT: All right. Then thank you,
09:15:51 19 Mr. Vincent.

09:15:52 20 MR. VINCENT: Thank you, Your Honor.

09:15:53 21 THE COURT: If the Plaintiff has a different idea
09:15:54 22 on it, I'd be happy to hear it.

09:15:57 23 Mr. Wang?

09:15:59 24 MR. WANG: Thank you, Your Honor.

09:16:01 25 Just to address this briefly, we were concerned

09:16:05 1 about errata being read for the point that you mentioned,
09:16:10 2 Your Honor, substantive changes in testimony. And I
09:16:12 3 believe what Mr. Vincent said, I partly agree with, which
09:16:16 4 is that in some prior pretrial orders, we did not have this
09:16:20 5 sentence, and we could address this issue for specific
09:16:25 6 designations instead of doing it the other way around to
09:16:30 7 have this and do it that way.

09:16:34 8 THE COURT: Well, why don't we have the
09:16:36 9 understanding be, then, that if there is no objection
09:16:43 10 raised by the party offering the deposition testimony, the
09:16:50 11 errata will be read where it would go in the testimony.
09:16:57 12 And if there's an objection to that errata on the theory
09:16:59 13 that it's not a proper use of an errata, then you would
09:17:05 14 raise that with Judge Gilstrap as part of the objection
09:17:11 15 process that we've been talking about.

09:17:15 16 MR. WANG: That makes sense, Your Honor, and we
09:17:17 17 agree to that.

09:17:17 18 THE COURT: All right. Then the pretrial order
09:17:20 19 will be deemed modified to that extent.

09:17:46 20 I wanted to also address one other procedural
09:17:50 21 issue raised in that section of the pretrial order.

09:17:53 22 On Page 20 of the Verizon pretrial order, Footnote
09:17:57 23 9, there is a statement that the parties reserve the right
09:18:01 24 to object to the use of pre-admitted exhibits with
09:18:07 25 particular witnesses.

09:18:07 1 I'm not familiar with that reservation. And if --
09:18:15 2 I don't know if both sides are agreeing to that or if that
09:18:21 3 is something that one side wants to speak for. But unless
09:18:24 4 I have some other explanation, I'll -- I will have to
09:18:30 5 strike that reservation because I -- it's not consistent
09:18:34 6 with my understanding of the purpose of pre-admission.

09:18:40 7 MR. WANG: Your Honor, I can speak to this
09:18:42 8 briefly.

09:18:43 9 The parties did agree to this. And in our
09:18:45 10 discussions, I think what we had in mind was this idea that
09:18:49 11 we know that pre-admitted exhibits are pre-admitted but
09:18:53 12 that the parties want to reserve the right to object to
09:18:58 13 certain witnesses testifying about an exhibit. And what we
09:19:04 14 have here is, you know, not having foundation, not being
09:19:08 15 able to speak to the exhibit, implying expert testimony
09:19:13 16 through the exhibit, and so that was what we preserved
09:19:17 17 here.

09:19:17 18 But, you know, if Your Honor has concerns with it,
09:19:21 19 I mean, the fact that it's in a footnote, we would defer to
09:19:25 20 Your Honor.

09:19:25 21 THE COURT: Well, if what you're saying is you
09:19:28 22 reserve the right to object to particular questions of a
09:19:34 23 witness, certainly you can do that. But we're not talking
09:19:38 24 about an objection to the exhibit then. Is that what --

09:19:46 25 MR. WANG: I think that's fair. I think that's

09:19:48 1 fair, Your Honor, and that's why we say object to the use
09:19:54 2 of pre-admitted exhibits.

09:19:55 3 And Your Honor may be correct to identify that as
09:20:01 4 an objection to certain questioning or examination.

09:20:08 5 THE COURT: Well, I just -- I don't want it to be
09:20:10 6 understood that there is a reservation of the right to
09:20:13 7 object to a lack of foundation for an exhibit. There may
09:20:17 8 well be a lack of foundation for a question. And if that's
09:20:27 9 all you're talking about, then that's fine.

09:20:29 10 MR. WANG: That's what we had in mind, Your Honor,
09:20:32 11 and so we're happy to revise this or take it out with
09:20:35 12 Your Honor's guidance.

09:20:36 13 THE COURT: Well, I'll just -- as long as it's
09:20:40 14 understood, then, that what that footnote is reserving is
09:20:43 15 the right to object to particular questions of a witness as
09:20:53 16 opposed to object to the exhibit -- and that's consistent
09:21:01 17 with your understanding of that footnote, Mr. Wang?

09:21:05 18 MR. WANG: Yes, Your Honor.

09:21:06 19 THE COURT: Okay. Does counsel for Defendant have
09:21:09 20 a different understanding of that?

09:21:11 21 MR. ROSENTHAL: No, Your Honor, that's fine. And
09:21:13 22 striking it is also fine.

09:21:14 23 THE COURT: All right. Well, I'll just leave it
09:21:19 24 in there with that clarification.

09:21:20 25 One other similar clarification would be in

09:21:29 1 Paragraph 22 of that section, which is on Page 21, to just
09:21:35 2 clarify that the juror notebooks, as you have described
09:21:39 3 them, are fine, but the witness pages that have the
09:21:49 4 photograph of the witness should have the name but not
09:21:54 5 the -- not title or any other information about the
09:21:58 6 witness, just the witness's name. And maybe by title, all
09:22:06 7 you meant was if the witness carries a doctor designation,
09:22:13 8 to have -- that designation is fine. But saying that the
09:22:18 9 witness holds a particular position with a particular
09:22:21 10 entity is not appropriate.

09:22:24 11 MR. ROSENTHAL: We understand. We'll follow that.

09:22:27 12 THE COURT: All right. I will also note that
09:22:40 13 consistent with the normal practice, the parties are
09:22:43 14 directed to withhold the Rule 50(a) motions until after the
09:22:49 15 close of all evidence. I know that counsel are routinely
09:22:55 16 worried about waiving their objections by not asserting
09:23:01 17 them at each stage of the case, but the record is being
09:23:06 18 made clear here that there is no waiver as long as you
09:23:12 19 present your motions after the close of all evidence.

09:23:15 20 I looked through the proposed jury instructions.
09:23:26 21 The format that you've got them in is very helpful. There
09:23:29 22 are at this point still too many disputes, but I would
09:23:35 23 direct the parties to continue to confer about that with
09:23:38 24 the idea that by the time the case gets to trial, you'll
09:23:42 25 have the proposed instructions down to as few disputes as

09:23:51 1 possible.

09:23:51 2 The Court will hold an informal pretrial -- I'm
09:23:57 3 sorry, an informal jury charge conference near the close of
09:24:03 4 all the evidence, and then after the formal charge is
09:24:10 5 prepared, there'll be a formal charge conference after the
09:24:15 6 close of all the evidence.

09:24:16 7 One thing I think that all counsel here are
09:24:20 8 familiar with is the Court's practice of requiring that
09:24:28 9 witnesses and others not refer to persons by only their
09:24:32 10 first name. In order to keep a clear record, you can use
09:24:41 11 just the last name or the first and last but not the first
09:24:46 12 name only. And counsel are directed to advise their
09:24:48 13 witnesses to comply with that, as well.

09:24:50 14 Judge Gilstrap has a standing order on sealing the
09:24:58 15 courtroom and sealing parts of the transcript after the
09:25:01 16 trial. I would direct counsel to review that standing
09:25:08 17 order and follow that if there is going to be a request to
09:25:13 18 seal the courtroom or the transcript.

09:25:16 19 The gist of or one of the goals of that standing
09:25:21 20 order process is to group any confidential evidence so that
09:25:27 21 the courtroom can be sealed and unsealed as few times as
09:25:32 22 possible, and, of course, to be sure to advise the Court as
09:25:37 23 soon as the confidential portion is done so that the
09:25:40 24 courtroom can be reopened promptly.

09:25:43 25 I know that there was a deadline in the docket

09:25:53 1 control order of last week, I think May 23, for the jury
09:25:57 2 questionnaire. Has a proposed questionnaire been sent to
09:26:03 3 Ms. Clendening?

09:26:06 4 MS. FAIR: Yes, Your Honor.

09:26:07 5 THE COURT: Okay. Good. Thank you.

09:26:08 6 In that case, you can expect that the
09:26:11 7 questionnaire will be available for counsel on the Thursday
09:26:19 8 before jury selection. It'll be available in the clerk's
09:26:24 9 office at that time.

09:26:28 10 That questionnaire is made available to counsel
09:26:30 11 with the understanding that it will be held by counsel in
09:26:36 12 confidence, not copied, not distributed, and destroyed
09:26:42 13 after the jury has been selected.

09:26:45 14 If you have any questions about that,
09:26:49 15 Judge Gilstrap does have a standing order on the court
09:26:54 16 website on the use of the questionnaire and the other jury
09:26:59 17 lists that identify prospective jurors.

09:27:04 18 The goal of all of that is to protect the privacy
09:27:08 19 of the whole venire, as well as the ultimately empaneled
09:27:19 20 jury, and so we take that seriously. And we expect that
09:27:23 21 counsel will not use those names to perform any
09:27:25 22 investigation in a way that can get back to the prospective
09:27:31 23 jurors. We don't want them to feel that their privacy is
09:27:35 24 being invaded. They do a lot already for us, and so we
09:27:40 25 want to protect them from that.

09:27:41 1 In connection with the jury, as you have pointed
09:27:47 2 out in your pretrial order, there are jury notebooks that
09:27:53 3 we'll need. We'll direct the parties to deliver 12 of
09:27:56 4 those notebooks. That's eight for the jury and four for
09:28:02 5 the staff.

09:28:06 6 Those should be delivered to chambers also by that
09:28:14 7 Thursday before jury selection so that we can make sure
09:28:16 8 that everything in those notebooks is appropriate. You can
09:28:21 9 deliver those at the same time that you pick up the jury
09:28:26 10 questionnaires and other jury information.

09:28:28 11 Everything you've set out in your pretrial order
09:28:34 12 is appropriate, so I'll just leave it at that.

09:28:38 13 I also want to mention that you should be prepared
09:28:42 14 to provide the Court with copies of the experts' reports.
09:28:50 15 As you know, the Court holds experts to the four corners of
09:28:54 16 their reports, and that occasionally leads to objections
09:28:59 17 regarding whether the question to an expert is within the
09:29:04 18 scope of the report. Those objections often require the
09:29:11 19 Court to consult the reports, so you will be requested to
09:29:17 20 provide both a paper copy and an electronic copy of the
09:29:23 21 reports to the Court, and you'll get an email, as we get
09:29:27 22 closer to trial, about when and how that should be
09:29:31 23 accomplished.

09:29:31 24 I will emphasize that resolving those objections
09:29:38 25 often means sending the jury out, therefore, they can take

09:29:44 1 a significant amount of time. That time will be charged to
09:29:49 2 whichever party is unsuccessful with the objection, and,
09:29:54 3 therefore, you should be careful about those objections.
09:30:01 4 And I would encourage counsel who are examining the direct
09:30:07 5 examination of the expert to have a reference to the
09:30:12 6 expert's report handy for each question you may ask in case
09:30:19 7 an objection comes up.

09:30:20 8 If there are other issues in the pretrial order
09:30:28 9 that need to be resolved, and I think there are a couple, I
09:30:33 10 want to turn to those in a moment. Then I want to take up
09:30:39 11 any objections regarding witnesses, and I don't mean the
09:30:45 12 Daubert-type objections. I mean objections that are more
09:30:50 13 procedural or disclosure-based. We'll then turn to the
09:30:56 14 motions in limine. We'll then turn to the pre-admission of
09:31:00 15 exhibits.

09:31:01 16 And I was happy to see, if I'm understanding your
09:31:06 17 bucket lists that have been emailed to the Court -- if I'm
09:31:09 18 understanding those, it looks like the number of exhibits
09:31:14 19 each side has is now consistent with Judge Gilstrap's
09:31:19 20 standing order. If not, I'll want to hear more about that
09:31:28 21 when we get to them.

09:31:30 22 I also want to take up any deposition objections
09:31:33 23 that relate to depositions that the Plaintiff may use on
09:31:40 24 the first day on the afternoon of the 23rd. And other than
09:31:47 25 that, later deposition objections will need to be addressed

09:31:52 1 in the format agreed to in the pretrial order.

09:31:58 2 I mentioned yesterday to Mr. Krevitt that if there
09:32:03 3 is more time this afternoon, we can give the parties the
09:32:09 4 option of arguing some of the other motions that are
09:32:14 5 pending, and so we'll see what -- what time remains for
09:32:19 6 that.

09:32:19 7 Does the Plaintiff have other items that the Court
09:32:26 8 should put on the agenda for today?

09:32:32 9 MR. FENSTER: No, Your Honor.

09:32:33 10 THE COURT: All right. Thank you, Mr. Fenster.

09:32:36 11 MR. MIRZAIE: Your Honor, actually there is one
09:32:38 12 more item that we identified for opposing counsel in our
09:32:40 13 email last night, and this is the issue of indemnification.
09:32:45 14 You'll recall that -- we can take it up now or at the end
09:32:50 15 of the day.

09:32:50 16 THE COURT: Why don't we take it up? That's
09:32:54 17 the -- about the -- a Google witness?

09:32:55 18 MR. MIRZAIE: In this case, it's not a Google
09:32:57 19 witness. It would be an Apple or Samsung witness because
09:33:00 20 they're the vendors in this case. Sort of akin to the
09:33:04 21 Google's position in the 103 trial.

09:33:06 22 THE COURT: Okay. Well, we can -- we can take
09:33:09 23 that up today certainly. I'll put that on the agenda --

09:33:13 24 MR. MIRZAIE: Thank you.

09:33:13 25 THE COURT: -- as well.

09:33:14 1 MR. MIRZAIE: Thank you.

09:33:15 2 THE COURT: Anything that the Defendant wants to
09:33:18 3 have on the agenda other than that?

09:33:20 4 MR. KREVITT: No, Your Honor. Thank you.

09:33:22 5 THE COURT: All right. Thank you, Mr. Krevitt.

09:33:23 6 I did see in the pretrial order some -- let's see,
09:33:51 7 it appears that the Plaintiff has proposed some
09:33:53 8 stipulations that are listed under the general stipulation
09:33:59 9 section as disputed.

09:34:01 10 Generally speaking, Mr. Wang, it takes two to
09:34:07 11 stipulate.

09:34:09 12 MR. WANG: Your Honor, yes, we had this -- this
09:34:14 13 language in there. It was agreed to for three or four
09:34:18 14 days, and then kind of the last day, Verizon raised an
09:34:22 15 objection, said -- put this in blue -- and I don't know if
09:34:27 16 they've articulated the objection or if they have a
09:34:30 17 proposal for objecting to authenticity of documents and
09:34:35 18 source code produced by Apple and Samsung.

09:34:38 19 I would note that in Stipulation 4, we agreed that
09:34:42 20 the parties stipulated to the authenticity of each document
09:34:47 21 that on its face appears generated by a party and produced
09:34:51 22 by that party.

09:34:51 23 Here, this -- discovery documents and source code
09:34:57 24 were produced pursuant to subpoena. I believe both
09:35:00 25 parties -- or at least Headwater subpoena, and they

09:35:04 1 produced these documents. And this stipulation also
09:35:07 2 doesn't prevent the parties from objecting to admissibility
09:35:10 3 under the other federal rules, 402/403, but we certainly
09:35:16 4 think it's appropriate to -- for them to be deemed
09:35:22 5 authentic. And we're not sure how this issue would
09:35:27 6 otherwise be resolved.

09:35:30 7 THE COURT: Well, I do understand that
09:35:36 8 authenticity is a low bar under Rule 901, but if there are
09:35:44 9 documents that were produced by a third party but on their
09:35:49 10 face they give no indication of that, there could be a
09:35:53 11 legitimate issue about authenticity.

09:35:54 12 So let me hear from the Defendant on that.

09:36:01 13 Thank you, Mr. Wang.

09:36:08 14 Mr. Vincent?

09:36:10 15 MR. VINCENT: Thank you, Your Honor.

09:36:11 16 And you've identified the problem with a global
09:36:15 17 stipulation to authenticity of every document that these
09:36:17 18 third parties have produced. Some of these productions
09:36:19 19 include third-party documents, not -- not of the party, for
09:36:23 20 example, Samsung.

09:36:24 21 We have an exhibit list we've gone through
09:36:27 22 painstakingly to negotiate and meet and confer on
09:36:30 23 objections to certain exhibits, and we have agreed, some of
09:36:34 24 these documents that have been produced by Samsung and
09:36:37 25 Apple are on the joint list, we don't have objections to.

09:36:40 1 And so we believe it's -- it's better to address these on
09:36:45 2 an individual basis. If they want to use a document, we're
09:36:49 3 happy to have that discussion, but we think it's
09:36:52 4 inappropriate to provide a blanket stipulation to
09:36:54 5 authenticity for every single document that these third
09:36:57 6 parties have produced.

09:36:59 7 THE COURT: All right. Thank you.

09:37:01 8 I then find that Paragraph 6 and 7 under the
09:37:08 9 general stipulations are not actually stipulated to. So
09:37:15 10 they will be disregarded.

09:37:19 11 And we'll take up authenticity issues for those
09:37:25 12 documents --

09:37:27 13 MR. VINCENT: Thank you.

09:37:27 14 THE COURT: -- on an exhibit-by-exhibit basis.

09:37:37 15 Is either Plaintiff or Verizon aware of other
09:37:40 16 disputes about the pretrial order that need to be resolved
09:37:46 17 before we adopt it?

09:38:00 18 MR. KREVITT: Your Honor, we raised an issue in
09:38:02 19 the pretrial order with respect to how to handle issues for
09:38:06 20 the Court, 101, obviousness, double patenting, for example,
09:38:13 21 when and how a bench trial might be appropriate on those
09:38:16 22 issues.

09:38:17 23 THE COURT: I think, as I understand it, both
09:38:19 24 sides are in agreement that those issues are not proper to
09:38:23 25 be presented to the jury, and it's just a question of when

09:38:26 1 they will be decided by the Court.

09:38:29 2 MR. KREVITT: That's our understanding, Your
09:38:31 3 Honor, yes.

09:38:32 4 THE COURT: All right.

09:38:33 5 MR. WANG: Not for 101, Your Honor. We put our
09:38:35 6 position very clearly on -- they have the pending motion.
09:38:40 7 We think it should be denied. If the claims are found
09:38:44 8 directed to an abstract idea, which we don't think they
09:38:48 9 should be, that would be a Part 2 issue for the jury. And
09:38:51 10 I think Verizon has a novel position interpreting Alice v.
09:38:58 11 CLS Bank as taking this away from the jury.

09:39:02 12 THE COURT: You know, I am very favorably inclined
09:39:06 13 to the Defendants' position that it should be for the
09:39:09 14 Court. I'm not convinced that that's what the law
09:39:14 15 currently provides, but I will make sure that that is
09:39:17 16 addressed in connection with the motion that's directing to
09:39:23 17 101 now.

09:39:25 18 MR. WANG: Thank you, Your Honor.

09:39:29 19 THE COURT: All right. Other than that, the
09:39:38 20 pretrial order --

09:39:39 21 MR. DAVIS: Hold on a second, Your Honor.

09:39:40 22 THE COURT: Go ahead, Mr. Davis.

09:39:44 23 MR. DAVIS: Just one more small item. So the
09:39:44 24 parties raised objections to witness lists with respect to
09:39:49 25 the joint pretrial order, as well.

09:39:50 1 THE COURT: And that's the next item that I am
09:39:54 2 going to turn to.

09:39:55 3 MR. DAVIS: Oh, very well.

09:39:55 4 THE COURT: So you can stay up there. I'll just
09:39:58 5 note that the pretrial order is adopted and turn to the
09:40:06 6 issues regarding witnesses.

09:40:08 7 What are the Plaintiff's objections to the
09:40:12 8 Defendants' witnesses?

09:40:14 9 MR. DAVIS: So the witness list issue that I
09:40:19 10 wanted to speak about, Your Honor, has to do with a
09:40:22 11 timeliness issue. This is -- there's a series of witnesses
09:40:27 12 who are current or former Verizon employees who were
09:40:33 13 identified to us very, very, very late in discovery. And,
09:40:39 14 you know, some of those folks we were able to get to sit
09:40:42 15 for deposition, and so we resolved that. That's not an
09:40:48 16 issue that we're raising. But others, you know, we tried
09:40:51 17 to subpoena, but it was just so late in the game.

09:40:56 18 One example, Your Honor, is a person named Venkat
09:41:04 19 Gaddam, who was just out of the country for a month and
09:41:07 20 wasn't disclosed to us until the end of fact discovery, so
09:41:11 21 we didn't have an opportunity to take his deposition.

09:41:14 22 So, you know, what we've done, Your Honor, is ask
09:41:17 23 the other side to say -- you're not going to call them at
09:41:24 24 trial, you're not going to rely on them. If that's the
09:41:27 25 case, then it's water under the bridge. But if they are

09:41:31 1 going to rely on these folks at trial, bring former
09:41:32 2 employees to trial who we've never had an opportunity to
09:41:35 3 depose, what we ask is that we get that chance to do so
09:41:39 4 because it's not that we squandered an opportunity, it's
09:41:43 5 that the opportunity was just taken from us because of how
09:41:46 6 late they were disclosed.

09:41:51 7 THE COURT: Mr. Davis, let's get specific here. I
09:41:54 8 see Mr. Gaddam. What other witnesses are you complaining
09:42:00 9 of?

09:42:01 10 MR. DAVIS: Yes, so it's the -- if you're looking
09:42:03 11 at the same document I am, Your Honor, it's that block of
09:42:07 12 five where --

09:42:08 13 THE COURT: I'm looking at Document 283-4.

09:42:11 14 MR. DAVIS: Okay. Yep, I was looking at 283-5,
09:42:18 15 but that's just fine. 283-4 will work, as well.

09:42:22 16 So that will be -- so it's starting on Page 4 at
09:42:37 17 Jude Munn, it's Jude Munn, Louis Chan-Lizardo, Venkat
09:42:46 18 Gaddam, Barry Hoffner. That's four of them. And then I
09:42:51 19 actually had another one, Your Honor. And that is Jonathan
09:43:02 20 Hinz, yes. It's H-i-n-z.

09:43:11 21 THE COURT: That's on the next page?

09:43:12 22 MR. DAVIS: Oh, yes, that's right, Your Honor.

09:43:12 23 THE COURT: All right.

09:43:13 24 MR. DAVIS: Yes. They're collected all in a row
09:43:15 25 with our "U," meaning "untimely objection," on -- it looks

09:43:19 1 like PDF Page 4 of Docket No. 283-5.

09:43:29 2 THE COURT: All right. I'm just using their list
09:43:32 3 because it has a little more information about them.

09:43:34 4 MR. DAVIS: Yes.

09:43:36 5 THE COURT: But all right. Let me see -- you are
09:43:41 6 representing that these five employees -- or individuals
09:43:45 7 were identified when?

09:43:47 8 MR. DAVIS: So it may vary a little bit, but all
09:43:50 9 of them, it's very late in discovery. You know, sometimes
09:43:56 10 within --

09:43:57 11 THE COURT: Was it five minutes until midnight on
09:44:00 12 the last day or --

09:44:00 13 MR. DAVIS: I'm sorry, Your Honor.

09:44:03 14 So I can -- I don't have all of those specifics
09:44:08 15 right now. I see at least some of those folks -- it looks
09:44:14 16 like two of them were disclosed to us on January 24th.
09:44:18 17 That would be Jude Munn and Louis Chan-Lizardo. I don't
09:44:24 18 believe the others were disclosed until after that.

09:44:27 19 We have another February 7th disclosure from
09:44:34 20 Verizon that includes -- I'm not sure that -- even that
09:44:40 21 includes -- oh, yes, I'm sorry, that does include
09:44:43 22 Mr. Gaddam at that point.

09:44:46 23 And so apologies, Your Honor, I don't have the
09:44:49 24 exact dates with me, but I can tell you it's very, very
09:44:54 25 close to within a couple of weeks.

09:45:00 1 And so we tried to act quickly in serving
09:45:03 2 subpoenas but just weren't able to get depositions from all
09:45:08 3 these folks.

09:45:08 4 THE COURT: What is your recollection as to --
09:45:12 5 well, I don't know -- I'll interrupt.

09:45:13 6 Mr. Krevitt, do you have a quick resolution for
09:45:17 7 us?

09:45:17 8 MR. KREVITT: Yes. Thank you for taking the blame
09:45:21 9 for the interruption by me standing up.

09:45:23 10 Your Honor, it's very possible that we're not
09:45:26 11 going to call these witnesses. The parties have reached
09:45:29 12 some resolutions with respect to motions in limine. It's
09:45:33 13 possible that with additional resolution today, we'll be in
09:45:37 14 a position to make a go/no go call on each one of these
09:45:43 15 witnesses and would suggest, therefore, that we put this
09:45:46 16 issue off.

09:45:46 17 THE COURT: All right. Thank you, Mr. Krevitt.

09:45:52 18 Well, Mr. Davis, why don't we proceed that way.
09:45:56 19 You have made the objection, and I will make sure the
09:45:59 20 objection gets resolved, but we'll wait and see at the end
09:46:04 21 of the day whether it's still a live objection or not.

09:46:06 22 MR. DAVIS: Thank you, Your Honor.

09:46:07 23 THE COURT: All right. Do you have any other
09:46:10 24 issues regarding witnesses other than those five?

09:46:15 25 MR. DAVIS: No. No, Your Honor.

09:46:18 1 THE COURT: All right. Thank you, Mr. Davis.

09:46:31 2 MR. VINCENT: Your Honor, Robert Vincent, and I'll
09:46:35 3 be quick about objections that Defendants have to
09:46:39 4 witnesses. Most of the objections will be resolved one way
09:46:41 5 or the other through the various motions that we have.

09:46:44 6 Some of the witnesses, though, are directed to,
09:46:49 7 for example, functionality on patents that are no longer in
09:46:53 8 the case, and, for example, that we have a 30(b)(6)
09:46:57 9 deponent on functionality related to the '543 patent, which
09:47:03 10 is no longer in the case. Those type of witnesses, there
09:47:06 11 are a few of them, but we would argue that those are
09:47:08 12 irrelevant to the case at this point. And so to the extent
09:47:11 13 that they involve functionality or issues that are -- that
09:47:15 14 go away -- that are gone now or that go away with the MILs
09:47:19 15 or summary judgment motions or Dauberts, that those issues
09:47:23 16 will be resolved.

09:47:25 17 THE COURT: All right. So that doesn't sound like
09:47:28 18 an objection that can be addressed now. Does that involve
09:47:36 19 specific witnesses that you can identify so we'll know what
09:47:41 20 is -- what you're raising?

09:47:43 21 MR. VINCENT: Yes, Your Honor. For example,
09:47:45 22 Michael -- I'm going to get the name wrong -- Kondratiuk.
09:47:51 23 He was a 30(b)(6) on functionality that's no longer
09:47:54 24 relevant to the case.

09:47:55 25 THE COURT: All right. I see him on the

09:48:01 1 Plaintiff's witness list, which is at Document 283-1.

09:48:07 2 Who else?

09:48:13 3 MR. VINCENT: So just a list of names, Thomas

09:48:16 4 McArtney, Michael Schiksnis --

09:48:30 5 THE COURT: All right.

09:48:31 6 MR. VINCENT: -- Nem Kashanian, Kartik

09:48:46 7 Umamaheswaran -- I'm sorry, I'm going to butcher these

09:48:48 8 names but -- Thomas Russell.

09:49:05 9 THE COURT: I don't see Mr. Russell on the witness

09:49:08 10 list.

09:49:12 11 MR. VINCENT: I believe, Your Honor, they filed a

09:49:14 12 corrected exhibit list -- or witness list, excuse me, Your

09:49:18 13 Honor, at some point, trying -- attempting to add

09:49:21 14 Mr. Russell.

09:49:22 15 THE COURT: All right.

09:49:25 16 MR. VINCENT: Oh, I apologize, Your Honor. We

09:49:27 17 thought they were, but I don't believe they ended up

09:49:29 18 actually filing it -- that corrected witness list, I'm

09:49:36 19 informed.

09:49:43 20 THE COURT: Any other witnesses that you have an

09:49:45 21 objection to?

09:49:46 22 MR. VINCENT: Yes, Your Honor. Just on the

09:49:49 23 T-Mobile side, there's a Mr. Ryan McGinn, and his testimony

09:49:56 24 is unrelated to any functionality still in the case for

09:50:00 25 T-Mobile.

09:50:03 1 THE COURT: I'll tell you what, let -- why don't
09:50:06 2 we hold that, because when we get past this, we'll have to
09:50:13 3 take up T-Mobile issues all at the same time. So...

09:50:21 4 MR. VINCENT: Thank you, Your Honor.

09:50:22 5 THE COURT: But what you have identified now are
09:50:24 6 objections that are just based on relevance on your
09:50:30 7 understanding that the purpose of those witnesses is no
09:50:36 8 longer in the case?

09:50:37 9 MR. VINCENT: Yes, Your Honor. That's a bucket of
09:50:39 10 witnesses for which we believe all relevance is no longer
09:50:43 11 in the case.

09:50:45 12 THE COURT: All right. Good enough. Thank you,
09:50:52 13 Mr. Vincent.

09:50:54 14 Does the Plaintiff agree that any of the witnesses
09:51:08 15 that Mr. Vincent just identified are no longer going to be
09:51:12 16 used by the Plaintiff, or is there a difference of opinion
09:51:15 17 as to what the relevance of their testimony is?

09:51:18 18 MR. WIETHOLTER: Yes, Your Honor. There's a
09:51:20 19 difference of opinion.

09:51:20 20 And one important note, many of these witnesses --
09:51:24 21 in fact, I believe all of them, will be coming via
09:51:28 22 deposition, unless Defendants were planning on calling one
09:51:31 23 of these people live. So we can handle all those
09:51:35 24 objections as part of the deposition designation process.

09:51:38 25 But I will note for the record that it's our

09:51:43 1 position that many of those witnesses that are Verizon
09:51:46 2 witnesses have relevance to issues other than the '543
09:51:50 3 patent. And one specific name is Mr. Schiksnis.
09:51:57 4 Mr. Schiksnis is actually not a Verizon employee. He's a
09:52:02 5 Samsung employee. He was the Samsung witness who Headwater
09:52:07 6 subpoenaed and deposed in this case. So he has relevance
09:52:08 7 to the device-side functionality, which is relevant to much
09:52:12 8 more than just the '543. So that witness in particular is
09:52:16 9 very different from the rest of the batch.

09:52:23 10 THE COURT: All right. Well, then, thank you,
09:52:26 11 Mr. Wietholter.

09:52:29 12 Mr. Vincent --

09:52:30 13 MR. VINCENT: Counsel is correct. I misspoke. We
09:52:31 14 have a motion on Mr. Schiksnis and the late-taken
09:52:35 15 deposition for the Samsung witness. But, again, that will
09:52:39 16 be resolved through that motion practice.

09:52:41 17 And we are also fine with -- to the extent they're
09:52:43 18 introducing deposition testimony of these witnesses to
09:52:45 19 handle objections through that process.

09:52:47 20 THE COURT: All right. Well, all five of the
09:52:50 21 witnesses that you named are shown on the witness list as
09:52:57 22 by deposition. So with that understanding, we will leave
09:53:01 23 those objections to be resolved through the deposition
09:53:07 24 objection process.

09:53:09 25 MR. VINCENT: Thank you, Your Honor.

09:53:10 1 THE COURT: Thank you, Mr. Vincent.

09:53:20 2 All right. Then let's turn to the motions in
09:53:22 3 limine. And we'll take up first Plaintiff's motions in
09:53:30 4 limine.

09:53:30 5 MR. DAVIS: Thank you, Your Honor. Kris Davis for
09:53:42 6 Plaintiff, Headwater.

09:53:42 7 With respect to Headwater MIL 1, happy to report
09:53:46 8 there has been some narrowing.

09:53:47 9 So the Defendants have agreed to Parts 2 and 3 of
09:53:51 10 this motion in limine so long as those conditions apply to
09:53:57 11 Verizon, to T-Mobile, and to Headwater, which is fine from
09:54:01 12 our perspective.

09:54:02 13 So that leaves Part 1 of this MIL. That relates
09:54:07 14 to [REDACTED]. So --

09:54:13 15 THE COURT: Before we move on, is your
09:54:17 16 understanding of Part 2, is the agreement just applicable
09:54:20 17 to the Qualcomm and Fortress offers, or are you applying it
09:54:32 18 more generally to any unconsummated offers?

09:54:35 19 MR. DAVIS: I believe just to the Qualcomm and
09:54:40 20 Fortress offers.

09:54:42 21 THE COURT: All right. I will consider it agreed,
09:54:45 22 then, with that understanding.

09:54:46 23 Go ahead on the first one then.

09:54:48 24 MR. DAVIS: And I should clarify, I don't believe
09:54:50 25 there are any other unconsummated offers besides Qualcomm

09:54:54 1 and Fortress that are at issue. So I think it ends up
09:55:00 2 being one and the same.

09:55:04 3 THE COURT: Well, we'll see, but it is limited to
09:55:06 4 Qualcomm and Fortress.

09:55:07 5 MR. DAVIS: Understood.

09:55:09 6 THE COURT: All right.

09:55:09 7 MR. DAVIS: All right. Thank you, Your Honor.

09:55:11 8 So, again, that leaves Part 1 of the MIL. That
09:55:16 9 relates to [REDACTED].

09:55:20 10 And the Court previously granted a MIL on this exact issue
09:55:24 11 in the 422 case. For the record, that's Headwater versus
09:55:29 12 Samsung, Case No. 2:22-CV-422. And this was in the 422 MIL
09:55:35 13 order at Pages 2 to 3 that was attached to our motions in
09:55:42 14 limine here as Exhibit 1.

09:55:44 15 The Court found that this had virtually no
09:55:47 16 probative value and that it was -- what little probative
09:55:54 17 value it might have was seriously outweighed by unfair
09:55:58 18 prejudice. I think the Court did so because it's a
09:56:00 19 salacious story that just isn't relevant to the issues in
09:56:04 20 this case.

09:56:04 21 The Defendants have a new twist or two here that
09:56:08 22 they say warrants different treatment. It does not. What
09:56:13 23 they're -- what they're raising, Your Honor, they want to
09:56:18 24 tell the jury about supposed [REDACTED] that
09:56:22 25 misled Verizon into investing into ItsOn, which was the

09:56:27 1 operating company that licensed Headwater's patented
09:56:31 2 technology.

09:56:32 3 But what they described is just plainly not
09:56:35 4 financial misconduct, and we'll show you why. I'll step
09:56:41 5 through it in more detail in a moment, but just at a high
09:56:45 6 level, what they're referring to is deposition testimony
09:56:48 7 about an email chain between Dr. Raleigh of ItsOn and a
09:56:54 8 person named [REDACTED] who was working with Dr. Raleigh
09:56:57 9 in the early stages to develop a financial model for
09:57:03 10 Headwater -- or, I'm sorry, for ItsOn.

09:57:06 11 At this point in time, ItsOn is just a brand new
09:57:09 12 startup. It hasn't even conducted Series A funding round,
09:57:15 13 and they're working on figuring out what should -- how they
09:57:18 14 should characterize the operating expenses over time and
09:57:22 15 what would be an accurate way of representing that to
09:57:24 16 potential investors.

09:57:25 17 So let's take a look at the email chain that gives
09:57:37 18 rise to all of this. Okay. And I'll begin at the bottom,
09:57:45 19 Your Honor. We also have a copy for the Court if you'd
09:57:47 20 like to see.

09:57:57 21 May we hand this up to Your Honor --

09:57:59 22 THE COURT: All right.

09:58:00 23 MR. DAVIS: -- if you'd like?

09:58:00 24 So what we see is -- I think that's -- it's
09:58:03 25 Johnson Exhibit 4.

09:58:04 1 So where this email thread begins, it's July 2009,
09:58:12 2 and the folks at ItsOn, including Dr. Raleigh, are
09:58:14 3 preparing documents for Verizon, sort of an investment
09:58:21 4 pitch to see if Verizon will be interested in investing in
09:58:25 5 ItsOn.

09:58:25 6 And as part of that, Verizon wants to see, not
09:58:29 7 surprisingly, expense plans, business revenue models,
09:58:32 8 et cetera. And so this is what they're working on.

09:58:37 9 THE COURT: Just so I can follow, is your argument
09:58:41 10 here, Mr. Davis, that this information that you're showing,
09:58:47 11 this email, would be excluded by your -- by your MIL, or
09:58:55 12 are you just trying to rebut their argument that they need
09:59:01 13 information or evidence that would be excluded by the MIL?

09:59:04 14 MR. DAVIS: It's a good question, Your Honor. So
09:59:07 15 what they want to do is bring in -- you see this reflected
09:59:10 16 in Page 2 of their opposition brief. They want to bring in
09:59:15 17 the prior -- [REDACTED]

09:59:19 18 [REDACTED] is exactly what
09:59:23 19 Your Honor excluded in the 422 case, but then they also
09:59:26 20 want to bring in what they're calling a second instance of
09:59:30 21 [REDACTED] testified
09:59:34 22 about at his deposition and what's reflected in these
09:59:38 23 emails.

09:59:39 24 We don't think -- this just is not [REDACTED]
09:59:44 25 [REDACTED], and I'll show you why.

09:59:46 1 So it's a fair question --

09:59:48 2 THE COURT: So would this be excluded by your MIL?

09:59:51 3 MR. DAVIS: Well, Your Honor, I think it should be
09:59:55 4 because they're characterizing it as [REDACTED].

09:59:59 5 And so it just -- I can explain to you why I think it is
10:00:05 6 not [REDACTED], but we think it's prejudicial in
10:00:08 7 any event and it's a distraction. I guess maybe what we
10:00:14 8 would do is tweak the MIL to say alleged [REDACTED]
10:00:16 9 [REDACTED]. I think -- you know, it's not actual [REDACTED]
10:00:20 10 [REDACTED], but it is alleged to be by Verizon in this
10:00:25 11 case, and T-Mobile for that matter.

10:00:27 12 THE COURT: Go ahead.

10:00:28 13 MR. DAVIS: Okay. So, Your Honor, what we see
10:00:34 14 now, this is just a few days later, and -- and we see
10:00:45 15 [REDACTED] gets involved, and he has some experience
10:00:47 16 working with companies and doing financial projections.
10:00:51 17 And he is explaining that there's -- he's having a sort of
10:01:00 18 debate with Dr. Raleigh about how they should characterize
10:01:03 19 the operating expenses.

10:01:05 20 [REDACTED] includes sort of a fixed number for
10:01:10 21 operating expenses that don't really change over time as
10:01:12 22 the company develops, whereas Dr. Raleigh is saying, you
10:01:17 23 know, no, I don't think that's really that -- as accurate
10:01:20 24 as it should be because we think the company's going to
10:01:23 25 grow, have more partnerships, and because we have more

1 partnerships, our operating expenses are going to grow, as
2 well. And so Dr. Raleigh is looking for the operating
3 expense information to be more dynamic, something that
4 changes over time.

5 And so they're -- they're going back and forth.
6 There's what -- the terminology that was used is a "fudge
7 factor" that is -- that appeared in the financial model to
8 show sort of this is what the operating expenses will be.

9 Dr. Raleigh is saying I think we should make it a
10 more dynamic model, and so let's remove that and make it
11 change over time.

12 [REDACTED] is saying here, you know, I think it
13 does make sense for it to be this sort of fixed approach,
14 but I've removed the fudge line in this version. He's also
15 saying what you see here in the middle of the screen is,
16 you know, I, of course, would like to make the numbers
17 completely ground up, but that's just a level of detail
18 that is very tough to build at this stage because it's a
19 brand new startup. It has no products, no revenue, no real
20 relationships at this point.

21 THE COURT: Mr. Davis, your presentation is
22 convincing me that this is not something that I can address
23 on a categorical basis as a MIL. Anything that could be
24 understood as financial mismanagement, I think that's too
25 vague a standard.

1 If you've got something specific -- like in the
2 422 case, what we were dealing with actually was wrongdoing
3 by a particular employee, and that was identified. And
4 maybe the MIL was written in a way that seemed broader, but
5 it was designed to deal with a specific incident.

6 MR. DAVIS: I see.

7 So what I would say, Your Honor, is that all
8 they've identified is this one particular instance, this --
9 what they call, like, fudging the financial model. I think
10 if the MIL includes this, that's sufficient for our
11 purposes at this point, Your Honor, because we don't -- we
12 don't know -- we're not aware of any other, you know,
13 allegations of financial misconduct that they want to
14 raise.

15 THE COURT: I mean, there -- in the prior case
16 that you're referring to, there was a specific allegation
17 of [REDACTED], and that's what
18 we were dealing with. So you're saying that this MIL --
19 this part of MIL 1 is really aimed at this event that
20 you're -- that's in this email?

21 MR. DAVIS: So I think it's -- they -- oh, no, I'm
22 sorry, no, Your Honor. This is a completely separate
23 factual event from the [REDACTED] that you're referring
24 to from the 422 case.

25 Verizon and T-Mobile try to link those two

10:04:40 1 together. What they say in their brief is that -- is this,
10:04:45 2 Your Honor.

10:04:45 3 THE COURT: I saw what they put in their brief. I
10:04:48 4 thought they were still addressing the issue about the
10:04:53 5 former employee from the 422 case.

10:05:00 6 MR. DAVIS: That's right, Your Honor, because this
10:05:01 7 is the same person. This is [REDACTED]
10:05:07 8 [REDACTED], as well. And
10:05:10 9 so what they're trying to show, and I think you see it in
10:05:13 10 their briefing, is that this is a pattern of [REDACTED]
10:05:18 11 [REDACTED] by ItsOn.

10:05:19 12 They say: [REDACTED]
10:05:25 13 [REDACTED] They were never disclosed to Verizon.

10:05:28 14 [REDACTED]
10:05:32 15 [REDACTED], are thus directly
10:05:35 16 relevant to contextualize this misconduct, what we're
10:05:40 17 seeing in the email, and Verizon's investments into ItsOn.

10:05:43 18 And so it's the Defendants who are trying to link
10:05:47 19 these two together.

10:05:50 20 THE COURT: Well, I don't have any problem in
10:05:53 21 saying that I'm not persuaded that the [REDACTED] is
10:06:00 22 relevant to contextualize this email exchange, but the
10:06:08 23 question of whether this email exchange is admissible in
10:06:15 24 this -- in this case is something that I didn't understand
10:06:21 25 your MIL was aimed at.

10:06:26 1 MR. DAVIS: So, Your Honor, what -- what happened
10:06:29 2 was we went to -- as you may have seen, our MIL 1 was a
10:06:34 3 multi-part MIL where we went to the other side and said:
10:06:38 4 The Court has already ruled on a number of issues in prior
10:06:42 5 Headwater cases. Will you stipulate to these MILs?

10:06:45 6 And the Defendants -- now they've stipulated to
10:06:49 7 Parts 2 and 3, but they refuse to stipulate as to Part 1.
10:06:53 8 They did not say at any point in time that this is what
10:06:57 9 factual circumstances they intended to raise, this fudging
10:07:02 10 of financial models, or what have you. And so that's why
10:07:06 11 our MIL was written in very short form. We spent just a
10:07:11 12 few sentences because all we thought was it was the
10:07:14 13 [REDACTED]. We said: Will you exclude -- will you
10:07:18 14 agree to exclude that?

10:07:19 15 They said: No.

10:07:20 16 They didn't say: No, because we have this other
10:07:25 17 instance of supposed fudging of financial models, and
10:07:30 18 that's what we want to keep in.

10:07:32 19 And so we saw this in their opposition brief. In
10:07:36 20 other words, we didn't write our opening brief to address
10:07:40 21 what's in their opposition brief.

10:07:44 22 THE COURT: Well -- so I take it that you are
10:07:53 23 seeking an order, as broad as it is written, that you want
10:07:58 24 the Court to say any alleged breach of ethical or fiduciary
10:08:05 25 duties is inadmissible?

10:08:06 1 MR. DAVIS: I think, Your Honor, that may be
10:08:12 2 preferable, but I think we would be fine with essentially
10:08:16 3 the sort of narrower 422 MIL order keeping out that
10:08:22 4 specific instance of [REDACTED]
10:08:25 5 [REDACTED]
10:08:32 6 [REDACTED].

10:08:34 7 If it keeps out those two instances, those are the
10:08:37 8 only two things that we're aware of that they would try to
10:08:40 9 raise.

10:08:42 10 THE COURT: Well, tell me why this email exchange
10:08:48 11 about the financial model is not relevant to their
10:08:56 12 investments in ItsOn.

10:08:57 13 MR. DAVIS: I mean, the -- I think I take your
10:09:05 14 point, Your Honor, that the general concept of, you know,
10:09:11 15 there being investments into ItsOn by Verizon and this is
10:09:17 16 talking about the investment into Verizon. If that's all
10:09:22 17 this was, that's fine from our perspective, Your Honor.

10:09:25 18 But it's -- it's the fact that they're
10:09:27 19 characterizing this as [REDACTED], which is just completely
10:09:31 20 inaccurate, and that they're trying to show this pattern of
10:09:36 21 [REDACTED] by linking it to this [REDACTED]
10:09:40 22 story.

10:09:41 23 THE COURT: Well, I could deal with the latter
10:09:45 24 part of that, but as far as whether this is something that
10:09:51 25 would be deemed misconduct or not, why isn't that just a

10:09:55 1 question for the jury? And, I mean, obviously, you -- you
10:10:01 2 have a way to respond to it and explain it. I'm not seeing
10:10:09 3 why it requires a motion in limine to address it.

10:10:15 4 MR. DAVIS: Uh-huh. So I think -- you know, there
10:10:25 5 is one other issue. With respect to the Verizon case, the
10:10:31 6 parties have agreed for Verizon's investments into
10:10:38 7 Headwater or ItsOn to be out of the case, and so --

10:10:43 8 THE COURT: Where is that agreement reflected?

10:10:46 9 MR. DAVIS: That was just this morning in the
10:10:48 10 courtroom. So it is not -- I'm not sure it's reduced to
10:10:52 11 paper yet.

10:10:53 12 THE COURT: All right. Well, that might resolve
10:10:55 13 this issue.

10:10:58 14 Let me interrupt you, Mr. Davis, and hear from
10:11:02 15 Mr. Rosenthal on that.

10:11:04 16 MR. DAVIS: Okay. Thank you, Your Honor.

10:11:05 17 THE COURT: Thank you.

10:11:06 18 Or Ms. Dominguez, I'm sorry.

10:11:06 19 MS. DOMINGUEZ: Good morning, Judge Payne.

10:11:06 20 Ms. Dominguez for Defendants.

10:11:17 21 So we agree with the Court. It sounds like the
10:11:18 22 MIL originally was supposed to be targeted to [REDACTED].
10:11:22 23 That's what's in the title of the MIL. There's no issue
10:11:24 24 there. We don't intend to raise [REDACTED].

10:11:27 25 Our concern was then in the body, it got -- it

1 seemed to get broader. It was talking about more amorphous
2 concepts like ethical and fiduciary duties. And we wanted
3 to be clear there are things that maybe they would
4 characterize that way that fairly come in, and that's why
5 we addressed what we did in our paper.

6 I think if Your Honor is just going to limit it to
7 [REDACTED], we have no issue with that, and that seems
8 like an easy way to resolve it.

9 THE COURT: And that is very helpful on the MIL.
10 Since we have spent a while talking about this email
11 exchange, is this something that you intend to offer if the
12 issue of investments by Verizon into Headwater/ItsOn is not
13 going to be an issue?

14 MS. DOMINGUEZ: So that particular exchange, if
15 there were no issue with Verizon's investments, which I
16 agree with Mr. Davis has been settled for the Verizon case,
17 then Your Honor is correct, we would not need to talk about
18 Verizon's investments, including the way those financial
19 numbers were presented to induce the investment.

20 However, they have not agreed that the Verizon
21 investments won't come in in the T-Mo case. We're hoping
22 to work that out. We discussed this morning that we would
23 continue to have discussions on that.

24 If they're still trying to bring in those Verizon
25 investments in the T-Mobile case, then certainly this would

1 be an example of evidence that -- testimony and emails that
2 contextualizes those investments.

3 THE COURT: All right. Well, we will then address
4 that when we take up separate issues in the T-Mobile case.

5 But it's fair for the Court to understand that
6 this July 27, 2009 email exchange between [REDACTED] and
7 Dr. Raleigh is not going to be used by the -- by Verizon?

8 MS. DOMINGUEZ: In the Verizon case, no, Your
9 Honor, because we've agreed that nothing about the Verizon
10 investments will come in.

11 THE COURT: All right. Thank you, Ms. Dominguez.

12 MS. DOMINGUEZ: Thank you.

13 THE COURT: Then I'm going to grant Motion in
14 Limine No. 1 with respect to the second and third parts as
15 agreed. And as to the first part, only as to evidence of
16 [REDACTED] if
17 there are -- and frankly, it won't be limited to that. But
18 as to [REDACTED], any remaining issues would have to be
19 addressed by seeking leave if there is something on that.

20 Mr. Davis, on the third point, you said there was
21 an agreement. Is the agreement limited to the expert's
22 relationship with the Plaintiff's law firm? Is that as far
23 as the agreement goes?

24 MR. DAVIS: Yes, that's right, Your Honor.

25 THE COURT: Because there was discussion about

10:14:47 1 should it involve clients, or should it be bilateral, but
10:14:51 2 the agreement you're saying has been reached is just as to
10:14:55 3 the -- what was sought in the MIL itself?

10:14:58 4 MR. DAVIS: Just that it's bilateral, Your Honor,
10:15:03 5 in other words, Plaintiff's law firm and Defendants' law
10:15:05 6 firm.

10:15:05 7 THE COURT: Okay.

10:15:06 8 MR. DAVIS: Sorry.

10:15:07 9 THE COURT: I didn't know if that meant your
10:15:11 10 relationship to their experts and you.

10:15:13 11 MR. DAVIS: Oh, I understand.

10:15:15 12 THE COURT: We're talking about two different
10:15:16 13 firms, then, and the relationship of each side's experts to
10:15:20 14 their law firm?

10:15:20 15 MR. DAVIS: Correct. That's right.

10:15:21 16 THE COURT: All right. Then it will be granted to
10:15:25 17 that extent.

10:15:30 18 Which takes us to your second MIL.

10:15:32 19 MR. DAVIS: All right. So Headwater's MIL No. 2
10:15:38 20 relates to the InterDigital letter of intent. We seek to
10:15:44 21 exclude the letter of intent altogether. As the Court may
10:15:49 22 have seen in our briefing, there's some important context
10:15:52 23 from the prior cases that -- you know, between Headwater
10:15:59 24 and Samsung that we think bears on this issue.

10:16:05 25 You know, in the 422 case, Your Honor, this Court

1 excluded evidence of unconsummated offers, but it allowed
2 evidence of the InterDigital letter of intent. And the
3 reason was it was -- although it was a non-binding letter
4 of intent and although it never actually materialized in a
5 deal, the Court sort of drew the line as -- it was signed
6 by Headwater, and so that's why the Court, I think,
7 decided, you know, the InterDigital letter of intent is a
8 little bit different from those unconsummated offers and
9 allowed it.

10 But there have been a couple of things that have
11 transpired since that time that we want to raise with the
12 Court and, you know, revisit this issue.

13 So in the --

14 THE COURT: Is it just the question of whether
15 speculation about why the letter of intent was not
16 consummated should be prohibited?

17 MR. DAVIS: So that's certainly a concern. We
18 think, Your Honor, that because the line-drawing is
19 extremely difficult to do, that it really makes sense to
20 exclude the exhibit altogether. And we saw that sort of
21 bear out in the 103 case between Headwater and Samsung.

22 But then there's also this additional reason that
23 we can talk about that relates to the results of the 103
24 trial and how -- the difficulty that we would have in sort
25 of fairly defending ourselves against the Defendants' point

1 that, you know, this -- the cash component of this
2 InterDigital letter of intent sets a ceiling for what the
3 patents are valued at.

4 Your Honor, needless to say, we understand and we
5 tried to convey it in our briefing, as well, that we
6 certainly understand that jury verdicts are not something
7 that is -- is normal to permit.

8 The issue we see is that the InterDigital letter
9 of intent, it's a -- it's a very particular agreement in
10 that there was a cash component and an equity component.
11 The cash component was for [REDACTED], but what
12 Dr. Raleigh has testified to many times for years is that
13 he valued the equity component at an amount even higher
14 than that. He thought that was actually very valuable and
15 specifically because not only did InterDigital have value
16 in itself but also that InterDigital, as part of the deal
17 if it went through, would be acquiring Headwater's 500 or
18 so patents, and Dr. Raleigh thought my patents are very
19 valuable, that's going to increase the equity value.

20 Now, what Defendants have said in -- or have tried
21 to convey in this case and others is that, well, you know,
22 Dr. Raleigh is just sort of speculating or making this up
23 because he doesn't have verdicts or large licenses or
24 something like that to support this, you know, notion that
25 it would actually add significant value to the equity

1 component of the deal. And the verdict in the 103 case
2 does support Dr. Raleigh's point that his patents -- at
3 least those patents, did have significant value.

4 And so what we tried to convey, Your Honor, is
5 that we would be in a position where, you know, Defendants
6 are getting to introduce this [REDACTED] amount to try to
7 convey that that's a ceiling on what the damages should be,
8 and, you know, we're seeking damages above [REDACTED], so,
9 therefore, you know, our damages' numbers are outlandish
10 and should be rejected.

11 But what -- if Dr. Raleigh could fairly defend
12 himself, he would be able to say, well, some of my patents
13 have, in fact, you know, been found to be infringed, valid,
14 and worth hundreds of millions of dollars.

15 And so that's the difficulty we have is that, you
16 know, we -- we appreciate that, you know, ordinarily, we
17 could not admit evidence that, you know, in another
18 Headwater case there was this large verdict, but the
19 particular facts here make it so that, you know, we should,
20 in fairness, be able to defend ourselves against the
21 allegations that Defendants have about this.

22 So that's sort of an additional reason, Your
23 Honor, beyond the speculation point, that we think it makes
24 sense to exclude the LOI altogether.

25 The issue with respect to speculation, I'm also

10:20:59 1 happy to speak about. We tried to quote from the trial
10:21:04 2 transcript in our briefing that Your Honor may have seen.
10:21:12 3 What transpired there is that, you know, there was a MIL
10:21:16 4 order, as Your Honor knows, in the 103 case where the --
10:21:20 5 where Samsung was prohibited from speculating about why the
10:21:23 6 InterDigital deal was not consummated.

10:21:26 7 THE COURT: And the Court decided that Samsung did
10:21:29 8 not speculate.

10:21:30 9 MR. DAVIS: I'm sorry, and Judge Gilstrap decided
10:21:33 10 that?

10:21:33 11 THE COURT: Yeah.

10:21:34 12 MR. DAVIS: Yes, you're correct, Your Honor.

10:21:36 13 Now, Judge Gilstrap did also say that he thought
10:21:38 14 that they got to -- 99.9 percent of the way there.
10:21:47 15 Respectfully, we disagree. We think they did cross the
10:21:47 16 line.

10:21:48 17 But the fact that we're either at 99.9 percent or
10:21:52 18 we're over the line, it sort of indicates that, you know,
10:21:55 19 we would -- at minimum, we think we should have some more
10:21:58 20 guardrails on this if the Court is inclined to let the
10:22:04 21 InterDigital letter of intent come into evidence at all.
10:22:07 22 We think some more specificity of guardrails would be
10:22:11 23 helpful.

10:22:12 24 I think what Your Honor saw in that transcript was
10:22:14 25 that Samsung, because they thought this was so important,

10:22:21 1 that they ended Dr. Raleigh's cross-examination with this
10:22:24 2 point -- with these couple of questions, saying, you know:
10:22:28 3 Well, didn't InterDigital get to, you know, due diligence,
10:22:32 4 look into the validity of these patents? And then followed
10:22:36 5 by didn't the deal fall through?

10:22:40 6 Yes, it fell through.

10:22:42 7 Okay. No further questions.

10:22:43 8 Now, we think that does insinuate that there's a
10:22:47 9 causal relationship between InterDigital looking at
10:22:50 10 validity of the patents and them not -- not going through
10:22:54 11 with the deal as a result of that.

10:22:56 12 THE COURT: And that caused the jury to reject
10:22:58 13 your claims?

10:22:59 14 MR. DAVIS: No, Your Honor.

10:23:03 15 THE COURT: Oh, the jury handled that
10:23:05 16 appropriately?

10:23:05 17 MR. DAVIS: I understand, Your Honor. They did.
10:23:07 18 And we appreciate that.

10:23:09 19 But I do think -- you know, we were very concerned
10:23:12 20 about it in the moment, and we're -- we're grateful that it
10:23:18 21 didn't ultimately, you know -- well, I guess who knows. We
10:23:22 22 didn't get our full damages request, but in any event, we
10:23:27 23 certainly take your point, Your Honor, that they didn't
10:23:28 24 award [REDACTED], for example.

10:23:33 25 But I think this is the difficulty that we just

10:23:36 1 don't want to have the -- the line-drawing of what does it
10:23:39 2 mean to speculate. You know, it may be helpful if there's
10:23:44 3 some additional guardrail of something like they don't get
10:23:49 4 to refer to InterDigital looking at the validity of the
10:23:53 5 patents or performing diligence on the patents and then
10:23:59 6 linking that to the deal not falling through -- or not
10:24:02 7 going through.

10:24:07 8 THE COURT: Well, I understand the argument. I
10:24:15 9 continue to feel that the InterDigital letter of intent is
10:24:20 10 something that is fair game in the case. It's not just
10:24:24 11 because it was signed but because it represents a position
10:24:31 12 that Headwater has actually taken that relates to the value
10:24:38 13 of the -- of the patents, and whereas mere offers that were
10:24:45 14 unconsummated do not represent a position by Headwater.

10:24:54 15 But unless the Defendant wants to try and talk me
10:24:59 16 out of it, I'm going to make the same ruling that -- that
10:25:05 17 the Defendant will be prohibited from offering or implying
10:25:16 18 any speculation about why the letter of intent was not
10:25:19 19 consummated. And I understand that that may be a hard line
10:25:25 20 to draw, but I'm confident that the Court can -- can
10:25:29 21 observe it. But I am not going to exclude reference to the
10:25:39 22 letter of intent itself.

10:25:42 23 I also do not accept the proposition that
10:25:50 24 the letter of intent justifies introduction of evidence
10:25:56 25 about a non-final verdict in another case. And I would

10:26:04 1 direct you to steer clear of that unless you get leave of
10:26:08 2 Court to go there.

10:26:09 3 MR. DAVIS: Understood, Your Honor.

10:26:10 4 THE COURT: All right. Does the Defendant want to
10:26:16 5 argue against the grant of MIL No. 2 to the extent I've
10:26:19 6 mentioned?

10:26:20 7 MR. KREVITT: No, Your Honor.

10:26:21 8 THE COURT: All right. Then I'll -- I'll grant
10:26:26 9 Motion in Limine No. 2 only to the extent of disallowing or
10:26:30 10 prohibiting any argument or evidence implying speculation
10:26:38 11 about why the letter of intent was not consummated, and
10:26:43 12 obviously that's something that would require leave to go
10:26:46 13 there.

10:26:48 14 That takes us -- before we turn to Motion in
10:26:53 15 Limine No. 3, we'll take the morning recess. I'm going to
10:26:58 16 try to keep it to a minimum because I'm going to have to
10:27:02 17 break for lunch at 11:30.

10:27:06 18 So anyway, we'll take a 10-minute recess.

10:27:10 19 COURT SECURITY OFFICER: All rise.

10:27:11 20 (Recess.)

10:27:11 21 COURT SECURITY OFFICER: All rise.

10:27:12 22 THE COURT: Thank you. Please be seated.

10:39:16 23 Mr. Fenster, are you ready for the next motion in
10:39:20 24 limine?

10:39:20 25 MR. FENSTER: Good morning, Your Honor. I'll be

10:39:22 1 addressing Headwater's Motion in Limine No. 3.

10:39:25 2 THE COURT: All right.

10:39:26 3 MR. FENSTER: And, specifically, this relates to
10:39:32 4 testimony -- excluding testimony from a prior case about
10:39:38 5 different patents that involved a different limitation that
10:39:42 6 would be confusing to discuss here. And specifically, Your
10:39:47 7 Honor, I would give you an example.

10:39:51 8 If we can pull up the first slide.

10:39:55 9 So, Your Honor, the '976 patent, which is listed
10:40:04 10 above, that was at issue Headwater versus Samsung 422 case.
10:40:13 11 The '613 patent is at issue in this case.

10:40:15 12 The specific limitation that was at issue in the
10:40:19 13 '976 patent was interacting in the device display
10:40:24 14 foreground. That limitation does not appear in any of the
10:40:27 15 patents, either the '541 or the '613 patent at issue in
10:40:32 16 this case.

10:40:32 17 There was specific testimony from the inventor,
10:40:39 18 James Lavine, and from the expert, Dr. Rick Wesel,
10:40:45 19 regarding that limitation. It would be confusing to
10:40:54 20 have -- to allow Verizon to cross-examine or to introduce
10:40:57 21 either the Lavine testimony by deposition or to
10:41:06 22 cross-examine Dr. Wesel with his opinions or testimony
10:41:10 23 regarding that limitation that -- from the 422 case that
10:41:12 24 does not appear in this case. And that's really the
10:41:15 25 specific testimony that we're seeking to exclude with

10:41:18 1 Motion in Limine 3.

10:41:18 2 And if you can go to the next slide, this, Your
10:41:24 3 Honor, is trial testimony from the 422 case. It was the
10:41:31 4 introduction of testimony from James Lavine by deposition,
10:41:35 5 and specifically it's that last Q&A: Do you believe
10:41:39 6 there's a distinction between a determination as to whether
10:41:41 7 an application is running in the foreground or background
10:41:45 8 versus a determination as to whether an application is
10:41:48 9 interacting in the device display foreground with the user?

10:41:52 10 And he answers: Yeah, there's a big difference.

10:41:57 11 That testimony, as -- is literally directed to a
10:42:02 12 specific limitation that does not appear in this case and
10:42:06 13 would be confusing to introduce it in this case.

10:42:09 14 There was similar testimony with respect to
10:42:12 15 questioning by Dr. Rick Wesel, and while we agree that he
10:42:20 16 should -- it's fair to cross-examine him with materials and
10:42:25 17 testimony from the 422 case, in general, this -- where
10:42:32 18 there's a difference in language in his testimony was
10:42:34 19 directed to a particular limitation that was not at issue
10:42:38 20 here, we think it would be prejudicial and confusing rather
10:42:42 21 than probative.

10:42:43 22 THE COURT: So what you're seeking to exclude is
10:42:47 23 just questions that are directed to a specific claim
10:42:52 24 limitation that's not being asserted in this case?

10:42:58 25 MR. FENSTER: Yes, with a slight tweak, Your

10:43:01 1 Honor, that we're seeking to exclude introduction of
10:43:04 2 testimony or cross-examine -- cross-examination using
10:43:08 3 testimony or materials that were directed to a specific
10:43:11 4 limitation that is not at issue in this case.

10:43:14 5 THE COURT: What the Defendants raise in their
10:43:17 6 opposition is that that they want to be able to ask about
10:43:23 7 testimony regarding products that are common to both.

10:43:28 8 MR. FENSTER: And I agree that that's fair game,
10:43:31 9 Your Honor. To the extent that Dr. Wesel testified about
10:43:35 10 Android functionality that was not specifically in the
10:43:37 11 context of or directed to the particular limitation "device
10:43:45 12 display foreground," we're fine with that.

10:43:47 13 Where the questioning was specific to a particular
10:43:49 14 limitation that was not at issue here, we think it would be
10:43:52 15 confusing and prejudicial because his testimony there was
10:43:56 16 directed to device display foreground. That doesn't appear
10:44:00 17 in this case, and it would require us to unpack the
10:44:05 18 different -- the difference in the language and that that
10:44:09 19 testimony was in a different case, a different patent,
10:44:12 20 et cetera.

10:44:13 21 THE COURT: All right.

10:44:15 22 MR. FENSTER: Thank you, Your Honor.

10:44:16 23 THE COURT: Thank you, Mr. Fenster.

10:44:20 24 MS. DOMINGUEZ: Hello again, Judge Payne.

10:44:28 25 Okay. So I'll just first point out that this --

10:44:33 1 what you just heard, the example that was given on the two
10:44:37 2 slides that Mr. Fenster put up, is the first time we've
10:44:39 3 ever seen an example of testimony that Headwater is trying
10:44:44 4 to exclude under this MIL.

10:44:45 5 We asked them in the meet and confer process to
10:44:49 6 identify what they thought was testimony specific to other
10:44:53 7 patents, and they didn't do so. They didn't do so in their
10:44:57 8 brief either.

10:44:58 9 So I'll -- I'll deal with the example that
10:45:01 10 Mr. Fenster just raised, and I think it shows exactly why
10:45:06 11 the MIL is not appropriate.

10:45:08 12 It is common, as Your Honor knows, when
10:45:11 13 questioning a fact witness about matters that are pertinent
10:45:16 14 to claim language, you don't necessarily use and frequently
10:45:19 15 don't use the exact language of the claim. To the extent
10:45:23 16 that we were, for instance, to ask a question using claim
10:45:26 17 language that doesn't precisely match, it would, of course,
10:45:30 18 be within Headwater's prerogative to point that out, to ask
10:45:35 19 questions about the differences.

10:45:37 20 But the idea that we are wholesale excluding, and
10:45:42 21 it's pretty vague, anything that's about other patents and
10:45:46 22 then Headwater gets to decide whether particular language
10:45:49 23 is about other patents, I think, is really unworkable.

10:45:52 24 So not only is the example that Mr. Fenster gave,
10:45:56 25 I think, an example of testimony that should not be

10:45:59 1 excluded and that is fair, the Defendants can ask about,
10:46:03 2 but the MIL itself is so broad and amorphous, and they've
10:46:09 3 not given any other examples, that it really hamstrings
10:46:12 4 Defendants from being able to ask fair questions about
10:46:17 5 identical subject matter or highly relevant overlapping
10:46:21 6 subject matter without fear of intruding upon this MIL that
10:46:25 7 they've requested.

10:46:26 8 THE COURT: What would be your analysis of the
10:46:30 9 example that was just shown?

10:46:35 10 MS. DOMINGUEZ: So, Your Honor, I know we have an
10:46:37 11 entire brief on the '613 patent and why we think, in fact,
10:46:41 12 those issues are dispositive. So I don't want to preempt
10:46:47 13 that issue, but we've -- we've spilled a lot of ink on this
10:46:51 14 already. This would be an example of where we have our
10:46:54 15 argument that the limitations are actually substantively
10:46:58 16 identical. We set that out. They have their argument as
10:47:01 17 to why they believe there is a material difference between
10:47:05 18 the two limitations.

10:47:08 19 But asking a question -- again, it's Defendants'
10:47:11 20 prerogative to ask the question. If the witness can be
10:47:15 21 impeached with prior inconsistent testimony, then
10:47:18 22 Defendants should be able to do that. That's the standard
10:47:21 23 rules.

10:47:21 24 If Headwater wants to point out that it wasn't
10:47:23 25 really inconsistent or that there's some difference that

10:47:25 1 makes it not inconsistent, Headwater can do that.

10:47:28 2 But what the MIL is asking is really a broad
10:47:32 3 sweeping limitation that would hamstring Defendants from
10:47:37 4 doing a full cross-examination of the same witnesses with
10:47:41 5 their own inconsistent testimony in the prior proceeding.

10:47:45 6 THE COURT: So what you're contemplating is that
10:47:55 7 if the Plaintiffs feel that the question is really directed
10:48:01 8 to a limitation in a patent that's not asserted here, they
10:48:06 9 would just have to make that objection in front of the
10:48:10 10 jury?

10:48:12 11 MS. DOMINGUEZ: Yes, Your Honor. I think it's
10:48:14 12 entirely appropriate. If we ask a question and they think
10:48:17 13 it's not a proper question, they can object to the
10:48:19 14 question. But the MIL is really unworkable and overbroad
10:48:23 15 as it's stated.

10:48:24 16 THE COURT: I think the point I'm hearing from
10:48:27 17 them is the concern that it would be prejudicial or
10:48:32 18 confusing to have to take the position that the witness was
10:48:39 19 addressing a different patent and, therefore, likely in a
10:48:44 20 different case.

10:48:46 21 MS. DOMINGUEZ: I don't think, Your Honor, that
10:48:48 22 that is something we would need to get into. We certainly
10:48:51 23 wouldn't bring up an another proceeding. And our questions
10:48:55 24 would be targeted to the relevant subject matter that is
10:48:57 25 identical here. We're under a -- as Your Honor said this

10:49:01 1 morning, presumptively an 11-hour time limit. So we
10:49:05 2 certainly don't want to waste our time talking about
10:49:08 3 patents that aren't in the case or issues that aren't in
10:49:11 4 the case.

10:49:11 5 But where a witness has testified about something
10:49:15 6 directly pertinent to the issues here, we certainly want to
10:49:18 7 be able to impeach that witness with their prior
10:49:22 8 inconsistent testimony.

10:49:22 9 THE COURT: But you would agree that the --
10:49:28 10 neither side should mention in front of the jury that there
10:49:36 11 is -- or there has been previous litigation asserting
10:49:41 12 different patents?

10:49:43 13 MS. DOMINGUEZ: Absolutely, Your Honor. Neither
10:49:46 14 side should be getting into that at all.

10:49:48 15 THE COURT: Uh-huh. What I'm tempted to do is to
10:49:58 16 carve out something that says that the parties are not to
10:50:04 17 reference patents that aren't asserted here or testimony
10:50:09 18 about those. And obviously, to the extent that you think
10:50:17 19 your question is directed to the description of the accused
10:50:27 20 products and the function of the accused products as
10:50:31 21 opposed to the patent that was asserted in that action,
10:50:37 22 then that would be -- you'd be on the right side of that
10:50:41 23 line.

10:50:41 24 What's the downside of the Court granting this MIL
10:50:50 25 to the extent of prohibiting testimony that is directed

10:50:58 1 specifically to patents that aren't asserted in this case?

10:51:02 2 MS. DOMINGUEZ: I would just do a small tweak on
10:51:04 3 that, Your Honor, because I think as long as it's -- that
10:51:09 4 we would not ask questions directed to patents asserted in
10:51:12 5 another case, the only reason I'm flagging for Your Honor
10:51:16 6 is there are some prior art patents, there are -- there's
10:51:18 7 going to be an exhibit dispute about a Verizon patent
10:51:22 8 relevant to damages. So there may be discussion of other
10:51:27 9 patents that could be captured in what you just said, but
10:51:31 10 certainly as to other asserted patents.

10:51:32 11 THE COURT: So that -- what you're wanting to make
10:51:35 12 sure we carve out is prior art?

10:51:39 13 MS. DOMINGUEZ: I'm sorry, Your Honor?

10:51:40 14 THE COURT: You're wanting to make sure we carve
10:51:41 15 out prior art patents?

10:51:44 16 MS. DOMINGUEZ: There are also at least one or two
10:51:47 17 patents relating to damages issues that are being disputed,
10:51:49 18 and so I just wanted to clarify that the MIL was not going
10:51:55 19 to other patents that relate to those other prior art or
10:52:00 20 damages issues.

10:52:01 21 THE COURT: Would any of those that you're
10:52:04 22 concerned about be patents previously asserted by the
10:52:11 23 Plaintiff?

10:52:12 24 MS. DOMINGUEZ: No, Your Honor.

10:52:14 25 THE COURT: So if I frame it that way, it would

10:52:16 1 capture what I want but not what you're concerned about.

10:52:24 2 All right.

10:52:26 3 MS. DOMINGUEZ: Your Honor, just one other
10:52:30 4 clarification. It would need to be clear that as long as
10:52:32 5 something is relevant to these patents, it comes in. It
10:52:36 6 could be relevant to another patent. And so maybe we need
10:52:41 7 to see the exact language, but certainly we would not be
10:52:44 8 asking questions specifically raising -- actually
10:52:49 9 discussing a patent that was asserted in another
10:52:51 10 litigation. But any questions that are about subject
10:52:54 11 matter that is relevant to these patents asserted in this
10:52:57 12 case, it may also be relevant to another patent. We would
10:53:01 13 want to be clear that anything that is relevant to these
10:53:04 14 patents asserted in this case comes in.

10:53:07 15 THE COURT: All right. Thank you, Ms. Dominguez.

10:53:12 16 Mr. Fenster?

10:53:15 17 MR. FENSTER: Your Honor, we would be -- we would
10:53:24 18 welcome Your Honor's articulated ruling. The caveat or the
10:53:30 19 carve-out that Ms. Dominguez just articulated I think would
10:53:35 20 gut the entire thing.

10:53:36 21 So, for example, this testimony -- can you pull up
10:53:44 22 the first -- the second slide? Yeah, this is fine.

10:53:46 23 So this was the testimony by Mr. Lavine that I
10:53:52 24 referenced. It's specifically addressing device display
10:53:56 25 foreground. They may argue that it's relevant because they

1 have the view that it's relevant, but this was clearly
2 being directed to a different patent.

3 And so we would request that the Court grant the
4 MIL to the extent that it would prohibit testimony that was
5 directed to patents that are not asserted here by the
6 Plaintiff. And that would include, for example, this
7 specific testimony by Mr. Lavine where he was asked
8 specifically about the patent -- this is not about a
9 product but the inventor testifying about the scope of a
10 patent and a particular patent limitation that is not at
11 issue here.

12 THE COURT: All right.

13 MR. FENSTER: Thank you, Your Honor.

14 THE COURT: Thank you.

15 I'm going to grant it, and I will try to be as
16 clear as possible in the written order about exactly what
17 it's directed to, but it will be something along the lines
18 of testimony or argument expressly directed to claim
19 limitations that are not asserted.

20 And I'll also mention in the order that it is not
21 designed to reach references to prior art. And I think
22 that the Court will be able to apply it appropriately.

23 But anyway, I'll take into account the arguments
24 made.

25 MS. DOMINGUEZ: Judge Payne --

10:55:56 1 THE COURT: Yes.

10:55:57 2 MS. DOMINGUEZ: -- if I could, I just want to
10:56:00 3 address, though, the particular question and answer that
10:56:04 4 Mr. Fenster raised and whether that would fall inside or
10:56:06 5 outside the scope of Your Honor's order because that
10:56:10 6 question is actually very pertinent to the patents in this
10:56:15 7 case.

10:56:16 8 So it's a question of one of the inventors of the
10:56:22 9 asserted patents in this case about language in a patent
10:56:25 10 that shares the same specification. These are both
10:56:31 11 continuations of the same application. They have the same
10:56:33 12 specification.

10:56:33 13 So whether the inventor believes there's a
10:56:36 14 distinction between a determination as to whether an
10:56:38 15 application is running in the foreground versus whether
10:56:41 16 it's interacting, and I understand it says device display
10:56:46 17 foreground, that "display" word is a different word, but
10:56:51 18 it's an extremely pertinent -- his answer that there's a
10:56:54 19 big difference bears on some of the most central issues for
10:56:59 20 the '613 patent.

10:57:00 21 So I just wanted to be clear, like, this would be
10:57:03 22 the type of question that should be fair game.

10:57:09 23 THE COURT: Obviously, if you can ask the inventor
10:57:13 24 a question that is just getting to what the inventor's
10:57:18 25 knowledge or understanding is, that's one thing. But if

10:57:22 1 you're wanting to impeach him with testimony that was
10:57:27 2 expressly directed to a limitation that's not in this case,
10:57:32 3 that's the problem.

10:57:34 4 MS. DOMINGUEZ: Your Honor, I would point out that
10:57:35 5 this would be an example of testimony where it would be
10:57:41 6 something we would want to use directly. We've designated
10:57:46 7 the testimony. This particular inventor wouldn't be
10:57:51 8 coming. So it wouldn't an impeachment issue. It would be
10:57:54 9 an issue of playing the testimony or reading in the
10:57:56 10 testimony, and Headwater could make its arguments about
10:57:59 11 whether there was an important distinction in the question
10:58:01 12 and answer.

10:58:02 13 THE COURT: And certainly so can you. I
10:58:04 14 understand that, but I'm not concerned about the effect of
10:58:10 15 the motion in limine on depositions where you'll be able to
10:58:13 16 argue these things out of the presence of the jury
10:58:18 17 beforehand.

10:58:19 18 The concern is with the live testimony, and the
10:58:22 19 function of the MIL is to try and shift this discussion to
10:58:28 20 something at the bench as opposed to in front of the jury.

10:58:35 21 MS. DOMINGUEZ: Okay. Thank you, Your Honor.

10:58:36 22 THE COURT: Thank you, Ms. Dominguez.

10:58:38 23 I'll try and take into account your arguments.

10:58:57 24 Let's go to MIL 4.

10:58:58 25 MR. HOFFMAN: Your Honor, the parties' agreement

10:59:01 1 to -- that both will not address Verizon's investments or
10:59:05 2 offers to invest in the Verizon case resolves MIL 4 as just
10:59:11 3 to the Verizon case.

10:59:12 4 The parties are still discussing a potential
10:59:17 5 agreement as to the T-Mobile case. And --

10:59:22 6 THE COURT: So should I interpret that to mean
10:59:25 7 that MIL 4 is agreed in the Verizon case?

10:59:30 8 MR. HOFFMAN: Yes. There's specific language the
10:59:31 9 parties have agreed to that we can submit to the Court.
10:59:36 10 But, yes, essentially it is agreed.

10:59:39 11 THE COURT: When are you going to submit that
10:59:44 12 language?

10:59:44 13 MR. HOFFMAN: I think we can take a look at it and
10:59:47 14 this afternoon?

10:59:48 15 MR. ROSENTHAL: Yes, Your Honor, that's fine. I
10:59:49 16 just wanted to be clear. It's language that the parties
10:59:52 17 have agreed. We'll submit it to the Court.

10:59:55 18 THE COURT: Okay. I'll expect to get back to that
10:59:57 19 this afternoon then.

11:00:04 20 MR. HOFFMAN: And as to T-Mobile, because the
11:00:06 21 parties are discussing a potential resolution, we would
11:00:08 22 suggest not addressing that today unless they -- not
11:00:14 23 addressing it until the parties have a chance to try to
11:00:19 24 resolve it.

11:00:20 25 THE COURT: All right. And we will address

11:00:23 1 T-Mobile as soon as we finish with Verizon. Thank you.

11:00:29 2 MR. HOFFMAN: Thank you.

11:00:29 3 THE COURT: So that takes us to No. 5, which
11:00:34 4 appears to be tied up, if I'm understanding it correctly,
11:00:39 5 with the motion that we heard yesterday.

11:00:43 6 Is there any reason that the resolution of
11:00:47 7 yesterday's motion won't also resolve MIL 5?

11:00:51 8 MR. WANG: Yes, Your Honor. So under MIL 5, the
11:00:56 9 Court should exclude evidence or argument with the jury
11:01:00 10 regarding alleged spoliation or document destruction by
11:01:05 11 Headwater or ItsOn.

11:01:06 12 And with Your Honor's question and comment in
11:01:10 13 mind, I just want to discuss specifically three reasons why
11:01:13 14 the Court should grant this relief now, and it doesn't
11:01:18 15 depend on -- it doesn't hinge on the arguments we heard
11:01:22 16 yesterday.

11:01:23 17 THE COURT: All right.

11:01:28 18 MR. WANG: Okay, Your Honor. So it's a clear
11:01:32 19 402/403 issue where we saw two thick binders of argument
11:01:39 20 papers yesterday regarding alleged spoliation document
11:01:43 21 destruction. And the probative value to the claims and
11:01:47 22 defenses of this patent infringement case are near zero.
11:01:53 23 Whereas, there's a very high substantial risk of unfair
11:01:59 24 prejudice, confusing the jury, and wasting what's currently
11:02:02 25 11 hours of trial time per side.

11:02:04 1 And --

11:02:07 2 THE COURT: Mr. Wang, let me interrupt you and
11:02:13 3 see. As I recall the Defendants' motion, they're not
11:02:15 4 asking for relief that would involve instructing the jury
11:02:20 5 about this issue. They're asking for relief that would
11:02:25 6 take items away from the jury. So maybe there is not a
11:02:34 7 situation where the resolution of their motion would leave
11:02:38 8 it as a jury issue, in which case your MIL would seem
11:02:46 9 appropriate, but...

11:02:47 10 MR. WANG: Exactly, Your Honor. That was going to
11:02:49 11 be my second point. They have not asked for any kind of
11:02:51 12 that relief. So we have a live ripe issue here. In none
11:02:56 13 of their papers on that motion do they ask for, you know,
11:03:01 14 allowance to introduce this with the jury.

11:03:03 15 THE COURT: All right.

11:03:06 16 MR. WANG: Mr. Krevitt didn't say anything about
11:03:08 17 that yesterday.

11:03:09 18 THE COURT: Thank you, Mr. Wang.

11:03:10 19 Let me hear -- if the Defendant has argument of a
11:03:16 20 scenario under which this would be an issue for the jury,
11:03:21 21 tell me about it.

11:03:21 22 MR. KREVITT: Thank you, Your Honor.

11:03:22 23 Your Honor obviously heard extensive argument
11:03:25 24 yesterday and is aware of the relief that we're seeking in
11:03:27 25 connection with the sanctions motions and why, given the

11:03:31 1 prejudice.

11:03:32 2 If Your Honor were to grant that motion, that
11:03:36 3 would -- which is why we said in our opposition here that
11:03:39 4 this is premature. If Your Honor were to agree with us
11:03:43 5 that a sanction is appropriate and were to agree with the
11:03:48 6 relief we have requested, for example, if ItsOn weren't
11:03:51 7 discussed in the case, we have no interest in coming to
11:03:54 8 trial and talking about the destruction of evidence.

11:04:00 9 If, though, the issues that were discussed
11:04:03 10 yesterday with Your Honor, any of those remain in the case,
11:04:06 11 then for all the reasons I explained as to why our ability
11:04:09 12 to defend ourselves has been severely hampered, we would
11:04:15 13 be -- it would be appropriate, and the cases, including
11:04:19 14 cases from Your Honor say it's appropriate, for us to talk
11:04:21 15 to the jury to explain to the jury that the material no
11:04:25 16 longer exists, that efforts to preserve it weren't taken.

11:04:30 17 THE COURT: You know, that's where I disagree with
11:04:32 18 you. I believe that you're right that you are entitled to
11:04:37 19 discuss with the jury whether or not there has been
11:04:40 20 spoliation, that certain records are not in existence or
11:04:46 21 not available, that you don't have them. But the fact that
11:04:54 22 efforts to preserve were not taken appropriately in your
11:05:00 23 opinion is not something that is necessary or appropriate
11:05:08 24 to tell the jury.

11:05:10 25 MR. KREVITT: Well, I'm hoping that's a question,

11:05:13 1 Your Honor, as opposed to a ruling.

11:05:14 2 And I have authority from Judge Payne that is to
11:05:21 3 the contrary. In the Aldridge case, for example, evidence
11:05:25 4 that should have been preserved and wasn't was allowed
11:05:31 5 before the jury.

11:05:32 6 In the Rembrandt case, the existence and the
11:05:35 7 maintenance and the preservation of information was allowed
11:05:38 8 to be discussed with the jury.

11:05:39 9 The Fifth Circuit has found that the issues of the
11:05:41 10 preservation and the maintenance and the production of
11:05:46 11 information is germane when Headwater could have preserved
11:05:51 12 this information. And I promise, I'm not arguing the
11:05:54 13 merits of that motion.

11:05:55 14 But when that could have been preserved and wasn't
11:05:58 15 preserved and now we're in a situation, if they were
11:06:01 16 permitted, pending Your Honor's resolution of the sanctions
11:06:04 17 motion, to make arguments about what ItsOn did and what
11:06:07 18 ItsOn didn't do and what Verizon knew and what Verizon
11:06:10 19 didn't know, it is, in our view, highly germane for the
11:06:13 20 jury to be aware not only that documents don't exist, that
11:06:18 21 were they to exist, we might be able to respond, but why
11:06:23 22 they don't exist.

11:06:24 23 To be clear, Your Honor, some of this may be
11:06:27 24 fine-tuning and parsing language. We don't intend to use
11:06:31 25 the verb "destroy" or the word "destruction." Spoliation

11:06:37 1 is not a word that we need to use. We would -- what we
11:06:41 2 would want -- and, again, we hope none of this becomes
11:06:44 3 necessary in light of the sanctions motion, but were it to
11:06:47 4 be necessary, we would want to be able to explain to the
11:06:51 5 jury why we don't have the information that might be highly
11:06:56 6 relevant here.

11:06:57 7 THE COURT: If the Court decides that a party has
11:06:59 8 not violated a duty of preservation, why should you be
11:07:05 9 allowed to argue to the jury that the party has?

11:07:11 10 MR. KREVITT: If the Court finds that there has
11:07:15 11 been no violation under Rule 37, then why should we be in a
11:07:23 12 position? Because in that case, Your Honor, your -- the
11:07:26 13 Court would have found simply that there could be any
11:07:30 14 manner of reasons as to how the Court were to get there,
11:07:33 15 for example -- well, Your Honor understands the different
11:07:36 16 factors that go into that -- any manner of reason the Court
11:07:40 17 could find that, including whether certain steps were
11:07:43 18 reasonable or not reasonable.

11:07:44 19 We would not be arguing any of that to the jury.
11:07:46 20 We wouldn't be arguing reasonableness, not reasonableness.
11:07:51 21 We would be saying to them -- rather to the jury the facts
11:07:53 22 that existed, that there was an ability to preserve these
11:07:58 23 documents. There was an ability to maintain these
11:08:02 24 documents and that wasn't --

11:08:03 25 THE COURT: What does it matter that there was an

11:08:06 1 ability to do it if the Court has decided that they were
11:08:08 2 not required to do it?

11:08:08 3 MR. KREVITT: Because the absence of evidence,
11:08:10 4 Your Honor, without explanation can very well and likely
11:08:14 5 would be used against Defendants unfairly. It's a double
11:08:14 6 prejudice, Your Honor.

11:08:18 7 We don't have the information to defend ourselves,
11:08:22 8 and we don't have the ability to tell the jury why we don't
11:08:25 9 have the information to defend ourselves.

11:08:27 10 THE COURT: Sure, you do. You don't have that
11:08:30 11 information because it's not been provided to you. But
11:08:36 12 what you want to do is go beyond that and say, and the
11:08:38 13 reason it wasn't provided to us is because the other side
11:08:43 14 lost it, destroyed it, negligently let it go.

11:08:47 15 MR. KREVITT: Well, again, maybe it's a question
11:08:49 16 of parsing, Your Honor. We are comfortable not saying
11:08:53 17 "destroying." We're comfortable not saying "negligently
11:08:56 18 let it go." We would -- and this is, again, not -- I know
11:09:03 19 I was cute earlier or pretended to be with referring to
11:09:06 20 Your Honor's authority, but this is done and has been in
11:09:09 21 many cases, including out of this court, in which -- and,
11:09:15 22 in fact, instructions have been given even when they
11:09:18 23 haven't been requested in connection with the Rule 37
11:09:19 24 motion that when we are at trial and Headwater is putting
11:09:24 25 on evidence that relates to ItsOn, should we get there,

1 should they be permitted to do so in light of the
2 circumstance that we find ourselves in, we would want to be
3 able and believe under the case law we should be entitled
4 to, explain where the documents were that no longer exist,
5 why they no longer exist, not because anybody intentionally
6 destroyed them or negligently destroyed them, but instead
7 because -- well, just the factual recitation as to what
8 happened as to whether the documents were preserved,
9 whether the documents were not preserved, whether the --
10 when and why the documents are no longer accessible to us.

11 Again, Your Honor, we would not be looking to end
12 run -- this presumes a denial of at least some of the
13 relief we requested, and we wouldn't be looking to end run
14 that ruling.

15 But as the prior cases, as I mentioned, the
16 Rembrandt, the Aldridge, the ZiiLabs case all find it is --
17 that last was -- was a case also from Your Honor in which
18 spoliation was not explicitly found and yet the Court
19 allowed a party -- and I confess, I don't remember if it's
20 the Plaintiff or the Defendant, but the aggrieved party, if
21 you will, to explain to the jury or to elicit testimony
22 regarding the maintenance, the preservation, the production
23 of relevant information, so the jury isn't left with the
24 false impression that we just didn't get the information or
25 maybe it's reasonable that the information isn't there.

11:10:56 1 And it's -- it may just be coincidental that the
11:10:59 2 only information that is there happens to support the
11:11:02 3 propositions that are being offered by Headwater.

11:11:04 4 That's why I call that a double prejudice, Your
11:11:07 5 Honor, and that's why the cases even when not giving an
11:11:10 6 instruction, even when not giving a remedy have still
11:11:13 7 allowed the introduction of argument and evidence regarding
11:11:15 8 the preservation and production of documents.

11:11:22 9 THE COURT: All right. Thank you --

11:11:24 10 MR. KREVITT: Thank you, Your Honor.

11:11:25 11 THE COURT: -- Mr. Krevitt.

11:11:30 12 And, Mr. Wang, I'm going to carry this one. I
11:11:37 13 expect to be ruling on the motion that was heard yesterday,
11:11:43 14 and that will inform the ruling on this Motion in Limine
11:11:49 15 No. 5.

11:11:52 16 MR. WANG: Your Honor, we respect that. Could I
11:11:55 17 have maybe 30 seconds to make three quick points?

11:11:58 18 THE COURT: All right. I'll give you 30 seconds.

11:12:00 19 MR. WANG: Thank you.

11:12:00 20 One, we agree with Your Honor's comments. The
11:12:02 21 concerns, they're very apparent. We're talking about
11:12:05 22 frolics and detours that are substantially unfairly
11:12:08 23 prejudicial.

11:12:09 24 The cases that Mr. Krevitt mentioned are nothing
11:12:12 25 like the case here. It's not relief that they've asked,

11:12:15 1 but they all involve intentional deletion or destruction of
11:12:20 2 discovery in a party's control while a case is pending.

11:12:24 3 And to analogize that here -- here is not appropriate.

11:12:27 4 The last thing I would say, Your Honor, is I would
11:12:31 5 just respectfully submit that although Mr. Krevitt agreed
11:12:34 6 not to mention destruction, on this issue respectfully,
11:12:37 7 Defendants have somewhat unclean hands where they've
11:12:41 8 accused us of doing destruction, spoliation.

11:12:44 9 THE COURT: All right.

11:12:46 10 MR. WANG: It's a very thin line that we don't
11:12:51 11 want to go down.

11:12:52 12 THE COURT: Thank you, Mr. Wang.

11:12:54 13 Let's move on to the Defendants' motions.

11:13:05 14 MR. ROSENTHAL: Good morning, Your Honor. Brian
11:13:10 15 Rosenthal on behalf of Defendants.

11:13:11 16 So with respect to our first MIL, this is a motion
11:13:16 17 to exclude any reference, whether testimony, argument, fact
11:13:20 18 witness, expert testimony, that the ItsOn product practiced
11:13:27 19 any of the three asserted claims -- of the three asserted
11:13:31 20 patents, I should say.

11:13:32 21 Couple easy parts of this. With respect to the
11:13:37 22 '613 patent, this doesn't seem to be an issue. It now
11:13:41 23 appears that Headwater's position is that they don't
11:13:43 24 practice, and so I think everyone's agreed that they will
11:13:46 25 not be saying that they practice the '613.

1 With respect to the '042 patent, I believe that is
2 also easy. I took the deposition of the expert,
3 Mr. Cooklev -- Dr. Cooklev with respect to the '042, and
4 I'm happy to show the testimony, but he said unambiguously:
5 I have no opinion whatsoever as to whether the ItsOn
6 product practices the '042.

7 And in making our arguments with respect to this
8 motion in limine, there was no attempt in the briefing to
9 show any evidence, argument, or anything else in the record
10 that would support the idea that they practice the '042.
11 So I believe that those two issues are very simple.

12 I believe that the issue with respect to the
13 remaining patent, the '541, is equally simple. There is
14 zero evidence in this case that is competent evidence that
15 the ItsOn product practiced the asserted claims of the
16 '541.

17 Now, we've had a lot of briefing on this, and at
18 every turn, the Plaintiff has said that's wrong. There
19 actually is evidence of that. And then they cite to a
20 bunch of stuff. They don't quote it. They cite to a bunch
21 of stuff. And when you actually look at what the evidence
22 is, no expert in this case has ever examined the ItsOn
23 product, even the hundred thousand pages of technical
24 documents that they alleged yesterday for the first time
25 exists about the ItsOn product. No expert has looked at

1 those documents and concluded, based on those documents,
2 I think that the '541 patent is practiced, let alone said
3 I think that Claims 79 and 83 of that patent are practiced.

4 This is a critical issue, and this is why we made
5 it our first motion in limine, because this is the trojan
6 horse that Headwater is using to bring in a whole host of
7 irrelevant stuff, copying and willfulness and notice and
8 all kinds of stuff, based on the notion that when
9 activities occur with respect to the ItsOn product, that
10 somehow that bears on these patents.

11 That entire line of argument is dependent on a
12 premise for which there is zero evidence in this case, and
13 that is that the two asserted claims of the '541 patent are
14 practiced.

15 So what have they actually pointed to? The first
16 thing they point to is they point to their experts.

17 Now, I heard Your Honor say, as I've heard
18 Judge Gilstrap and you say many, many times, in this court,
19 experts are limited to the four corners of what they wrote
20 down in their expert reports.

21 I have in my hand excerpts of their two experts on
22 the '541 patent, Mr. de la Iglesia and Mr. -- I'm sorry,
23 Dr. de la Iglesia and Dr. Wesel. These are all of the
24 paragraphs that they cite to in their briefs, and I've
25 studied them carefully. I have them on a slide if

11:16:44 1 Your Honor would like to walk through each one of them,
11:16:47 2 but -- and I'll hand these up to the Court, with the
11:16:51 3 Court's permission now.

11:16:54 4 THE COURT: If you could also provide a copy to
11:16:55 5 Plaintiff's counsel.

11:16:56 6 MR. ROSENTHAL: Yes, Your Honor.

11:17:07 7 Here's Dr. Wesel. Here's Dr. de la Iglesia.

11:17:14 8 MR. MIRZAIE: Thank you.

11:17:14 9 MR. ROSENTHAL: You got it?

11:17:15 10 And here are copies of those for the Court -- I'm
11:17:19 11 sorry, Mr. de la Iglesia.

11:17:27 12 So there are multiple copies of each, but there's
11:17:30 13 a -- within the paperclip, you'll find copies of Dr. Wesel
11:17:35 14 and you'll find copies of Mr. de la Iglesia.

11:17:45 15 And we can bring that up on the slide.

11:17:48 16 There should be three copies of each of them.
11:18:10 17 Hopefully I did that right.

11:18:11 18 So if I could have the -- you have two?

11:18:16 19 COURTROOM DEPUTY: Two witnesses.

11:18:17 20 MR. ROSENTHAL: Two witnesses, that's right.

11:18:19 21 So, Your Honor, if we could start, I'll show on
11:18:22 22 the ELMO exactly what was said in those paragraphs.

11:18:23 23 If we could start, please, with Dr. Wesel.

11:18:34 24 So the paragraphs that they pointed to of
11:18:40 25 Dr. Wesel that they say show that Dr. Wesel actually did

11:18:42 1 this analysis and should be permitted to testify about this
11:18:46 2 begin at Paragraph 84.

11:18:48 3 Paragraph 84 has no analysis. Paragraph 84 simply
11:18:51 4 says that there was a marking page. And then it goes
11:18:55 5 through with many bullets showing evidence of that marking
11:18:58 6 page where he says that the '541 patent was present on the
11:19:02 7 marking page and that the '613 patent was not. That's what
11:19:07 8 that entire paragraphs says. It has no analysis whatsoever
11:19:11 9 of how the ItsOn product worked.

11:19:14 10 Even to the extent that the '541 patent appeared
11:19:17 11 on the marking page, we have evidence in the record from
11:19:21 12 Krista Jacobsen, who was in charge of that marking page,
11:19:25 13 who was the 30(b)(6) witness who testified that all that
11:19:28 14 they determined in order to see whether or not a product
11:19:31 15 goes up on that marking page or a patent goes up on that
11:19:34 16 marking page is if one or more claims of that patent are
11:19:40 17 met.

11:19:41 18 And in this case, Claim 1 of the '541 patent,
11:19:44 19 which would be the most natural one for people to look at,
11:19:49 20 has been disclaimed.

11:19:49 21 The only question in this case is about Claim 79
11:19:53 22 and 83. The fact that the product and the patent appear on
11:19:57 23 a marking page have nothing to do with whether those two
11:19:57 24 claims are met by the product.

11:20:04 25 And in any event, Dr. Wesel does none of that

11:20:07 1 analysis. He simply says: The ItsOn software included
11:20:10 2 links. And he goes through and explains what all that --
11:20:12 3 that evidence that supports it shows. That's what all
11:20:14 4 these bullets on the next page are, just more evidence
11:20:18 5 about the marking page. So there's no analysis there.

11:20:21 6 The next paragraph is Paragraph 85, which simply
11:20:27 7 says, see also a bunch of stuff in my appendices. There's
11:20:32 8 nothing in those appendices that says anything -- and I'll
11:20:35 9 represent to you, that says anything about whether the
11:20:38 10 ItsOn product meets those claims.

11:20:41 11 The next paragraph is the only paragraph that has
11:20:43 12 any relevance to this issue, and it simply says: I
11:20:49 13 understand -- not opine, not believe, understand -- I
11:20:54 14 understand that ItsOn practiced the '541 but not the '613.

11:20:58 15 He never even says that it practiced Claim 79 and
11:21:02 16 83. He says, I understand -- not believe, analyzed,
11:21:07 17 opined, and he doesn't even address the two claims at
11:21:09 18 issue.

11:21:10 19 The remaining paragraphs that they cite, 87
11:21:13 20 through 91, I believe, all of those have only to do with
11:21:18 21 the '613 patent and his explanation as to why the '613
11:21:22 22 patent is not practiced.

11:21:23 23 So Headwater repeatedly says in their briefing
11:21:28 24 that Dr. Wesel did do an analysis and that he did opine and
11:21:32 25 did conclude that Claim 79 and 83 are practiced by the

11:21:36 1 ItsOn product. That is absolutely incorrect. He did not
11:21:39 2 do that analysis. That is not in his report.

11:21:42 3 The only paragraph that comes close is 86, and
11:21:48 4 there he doesn't say anything other than he has an
11:21:51 5 understanding. So that's Dr. Wesel.

11:21:54 6 Mr. de la Iglesia is worse. For Mr. de la
11:22:01 7 Iglesia, they identified several paragraphs of Mr. de la
11:22:06 8 Iglesia's report. And in none of those paragraphs does he
11:22:10 9 do any analysis whatsoever of the asserted claims and
11:22:14 10 compare it to the ItsOn product.

11:22:17 11 Instead, he says -- and I'm showing Paragraph 430,
11:22:21 12 and I've highlighted the sentence -- the only sentence that
11:22:23 13 has any relevance here. It says: I understand from
11:22:27 14 Dr. Wesel's report -- that's the paragraph we just saw --
11:22:30 15 that the ItsOn software offered these benefits similar to
11:22:36 16 those offered by the accused features. And then in
11:22:39 17 parentheses, he says: Because they -- presumably the
11:22:42 18 accused features -- practice the asserted claims. That's
11:22:46 19 as close as he comes.

11:22:47 20 There's nothing else in the entirety of this
11:22:50 21 paragraph, Paragraph 430, that does any analysis of the
11:22:55 22 ItsOn software in comparing it to the asserted claims.

11:22:57 23 They've also cited -- I've highlighted Paragraph
11:23:06 24 454. 454 is nearly identical to 430, and it has the very
11:23:13 25 same sentence. The ItsOn software offers these benefits

1 that are similar to the accused products because
2 the accused -- because those accused products practice the
3 asserted claims.

4 And they also identified Paragraph 463, which has
5 the same sentence and the same general content.

6 Those are the only three paragraphs of Mr. de la
7 Iglesia's report that they point to.

8 Now, they also point to stuff in his deposition,
9 which is -- is hand-wavy, at best, but in any event, that's
10 not the rule in this court. The rule in this court is
11 you're limited to the opinions that you provided in your
12 reports. And there is no opinion by either expert that the
13 two asserted claims of the '541, in fact, are practiced by
14 ItsOn. Nobody's ever made that analysis.

15 Mr. Krevitt argued yesterday that nobody could
16 have done so because the material to do so doesn't exist.
17 But even -- I mean, you heard Headwater get up and say, oh,
18 there's lots of documents from which you could have made
19 that assessment. There's lots of documents -- technical
20 documents that we produced from which you could have made
21 that assessment, and they pointed to all kinds of stuff
22 that they say exist in the record.

23 But their experts never looked at any of that and
24 concluded based on that, ah, here's where the elements of
25 Claim 79 and 83 are.

1 And so what we have is a whole house of cards of
2 copying and willfulness and all kinds of other stuff that
3 is resting on a premise, a necessary legal premise for the
4 relevance of that information, which is that the product
5 practiced the two claims that are at issue in this case for
6 which there is zero evidence.

7 The only other two things that they point to as
8 alleged evidence of that fact, other than those
9 non-existent opinions of their experts, are they say, A,
10 Dr. Raleigh said he thinks that they practice. Well,
11 that's a lay witness who has not provided any expert report
12 in this case. We wouldn't even be permitted to ask him
13 that question in this court, let alone have them rely on
14 that naked lay opinion about claims for which there is a
15 legal question about whether or not they're practiced.

16 In fact, Dr. Raleigh -- and we pointed to this
17 testimony in our briefing. Dr. Raleigh, when we were
18 asking, why didn't you sue us for 10 years? Why didn't you
19 write us a letter for 10 years? He said: There's no way I
20 could have because you need an expert to see whether you
21 infringe. You require expert testimony, and we didn't have
22 access to an expert for 10 years. It was too expensive.

23 That was his story.

24 Now Headwater wants to be able to introduce
25 Dr. Raleigh to say: Don't worry about it, trust me --

11:25:59 1 literally he said trust me -- I did the analysis, and you
11:26:03 2 infringe -- or, sorry, the ItsOn product meets the claims.
11:26:06 3 So that is really inappropriate. It's
11:26:10 4 inappropriate not only as a general matter to have a lay
11:26:14 5 witness testify about whether a product meets a claim, it
11:26:19 6 is particularly inappropriate when that particular witness
11:26:22 7 has said I cannot even make that assessment without an
11:26:25 8 expert.

11:26:27 9 And the last piece of evidence that they point to
11:26:30 10 is they say, well, we marked. And since we included the
11:26:36 11 '541 patent on our marking page, we should be allowed to
11:26:38 12 tell the jury that these claims are practiced by the
11:26:40 13 product.

11:26:42 14 That's backward and bootstrapping. I mean, the
11:26:44 15 fact that they made some decision to put a product and a
11:26:47 16 patent up on a marking page is not evidence that it, in
11:26:50 17 fact, meets the claims. It's evidence that someone put
11:26:52 18 that patent number on the marking page.

11:26:54 19 But even if you take that -- we actually took the
11:26:58 20 deposition of Ms. Jacobsen who testified about that marking
11:27:03 21 page, and we asked her the question directly: Does the
11:27:06 22 ItsOn product meet any claims of the '541?

11:27:09 23 And she said: I don't know the answer to that.
11:27:13 24 All I know is the procedure we went to. And all I know
11:27:16 25 about the procedure is that we would put a product up there

1 if one or more claims we believe were met.

2 So that's the most that that marking page could
3 possibly do is establish that someone at some point
4 believed that one or more of the claims are met. The
5 question in this case is about these two claims.

6 And so we don't believe that they should be
7 permitted to put any evidence of this on since there's no
8 competent evidence that would support it. This is a motion
9 in limine issue because there's a huge prejudice that comes
10 with their ability to link -- improperly and without
11 support through speculation, to link this product to these
12 two claims of this patent because it brings with it so much
13 prejudicial evidence.

14 The other thing that they argue is we can't make
15 this argument because we are separately arguing that they
16 haven't met their marking obligations. They say there's an
17 inconsistency between those two things. That is absolutely
18 not true. At no point in this case have we ever said that
19 the '541 patent is practiced by the ItsOn product.

20 We have a -- we submitted an Arctic Cat letter,
21 which is Exhibit 14 to our MILs. And in that Arctic Cat
22 letter on May 24th of 2024, we said only the following.

23 We said: You, Headwater, have taken the position
24 that the ItsOn product practices this patent, therefore, we
25 are notifying you under Arctic Cat that you are now obliged

11:28:58 1 to demonstrate that you met the marking requisites -- that
11:29:02 2 you met the marking requirements.

11:29:05 3 We never said that we agree with that. To this
11:29:07 4 day, there is not a single piece of paper in this case
11:29:10 5 where we said we believe that this product practices the
11:29:14 6 '541, and we do not believe that it does, right?

11:29:18 7 But they said it did. They continue to say it
11:29:21 8 does. And, therefore, under the law, they have an
11:29:23 9 obligation to demonstrate that they've met their marking
11:29:25 10 obligations.

11:29:25 11 So there's no inconsistency at all between what
11:29:28 12 we're arguing now and what we have in our marking paper.

11:29:31 13 So I believe that's it.

11:29:34 14 The only other thing I will say is this. They
11:29:37 15 also say that, well, if -- if this motion is granted, that
11:29:39 16 that has some impact on whether we can talk about the
11:29:44 17 failure of the ItsOn products. That's an issue that we're
11:29:47 18 going to discuss later today. And based on the outcome of
11:29:49 19 this MIL, they can argue that that has some impact on that.
11:29:52 20 We don't believe it does. That is not what this MIL is
11:29:57 21 about.

11:29:57 22 This MIL is about a very singular issue. Are they
11:30:00 23 permitted to put on any evidence, argument, or suggestion
11:30:02 24 that the ItsOn product practices these two claims -- well,
11:30:06 25 any of the patents, but these two are the only real issue.

11:30:09 1 THE COURT: All right.

11:30:09 2 MR. ROSENTHAL: Thank you, Your Honor.

11:30:12 3 THE COURT: Thank you, Mr. Rosenthal.

11:30:13 4 We will adjourn until 1:30. And I'll hear from
11:30:17 5 the Plaintiff on this MIL. Thank you.

11:30:20 6 COURT SECURITY OFFICER: All rise.

11:30:21 7 (Recess.)

11:30:22 8 COURT SECURITY OFFICER: All rise.

01:29:00 9 THE COURT: Thank you. Please be seated.

01:30:44 10 Mr. Mirzaie, whenever you're ready.

01:30:51 11 MR. MIRZAIE: Thank you, Your Honor.

01:30:52 12 And we do have a set of slides, mainly on MIL 1,
01:30:59 13 but I think they also relate to portions of the next MIL,
01:31:04 14 Your Honor, so we'll pass those out.

01:31:12 15 Can we get the -- I guess the -- thanks. Can I
01:31:16 16 get Slide 1?

01:31:16 17 Your Honor, the entire basis of Defendants' MIL
01:31:38 18 No. 1, as we just heard, was Headwater has no competent
01:31:43 19 evidence that the patents were practiced by ItsOn. And
01:31:48 20 what was made clear in the briefs and is crystal clear now
01:31:52 21 that -- is that what Defendants mean by that is one thing
01:31:56 22 only, that Headwater has no competent evidence because it
01:32:01 23 should have presented expert opinions detailing a claim
01:32:05 24 mapping between the claims and the ItsOn products for
01:32:09 25 purposes other than infringement, marking, and secondary

01:32:12 1 indicia.

01:32:13 2 And the main problem with that for them is that
01:32:17 3 the case law does not in any way support that argument, and
01:32:21 4 I'll get into that. And the relevant case law contradicts
01:32:24 5 it. It's not Headwater's burden to have that kind of claim
01:32:33 6 mapping or expert evidence at all for marking where they
01:32:37 7 agree or stipulate that a product by ItsOn uses the patent.
01:32:42 8 And it's also not Headwater's burden of persuasion at all
01:32:46 9 with regard to secondary indicia.

01:32:48 10 Headwater has the burden of production with regard
01:32:53 11 to a secondary indicia to identify products. And it's
01:32:56 12 actually the burden of proof and persuasion with regard to
01:33:00 13 expert testimony or otherwise stays with Defendants on
01:33:04 14 secondary indicia because it's an issue of validity --
01:33:08 15 invalidity rather.

01:33:09 16 And what the cases will show also is that there is
01:33:12 17 no requirement that expert testimony on those things is
01:33:15 18 required at all. The main case that Defendants have -- the
01:33:20 19 only case they cited is the Centricut case. The Centricut
01:33:25 20 case makes clear that -- and the Defendants concede in
01:33:28 21 their reply that it's not a per se rule that expert
01:33:32 22 testimony is needed in every case. It's only needed for
01:33:35 23 infringement and validity in highly complex cases.

01:33:38 24 But the bigger point of that case, Your Honor, is
01:33:41 25 that it's limited to the issues where a claim mapping is

01:33:45 1 required, and that's infringement and validity. Those do
01:33:50 2 not apply to the issues of marking or secondary indicia,
01:33:55 3 which is I think the real thrust of this MIL.

01:34:00 4 The Defendants' MIL is not about any infringement
01:34:02 5 opinions. It's about opinions regarding whether ItsOn, a
01:34:06 6 licensed product, practiced it. And for that, there's just
01:34:10 7 no legal requirement at all that there be expert opinions,
01:34:13 8 let alone expert opinions detailing claim mapping.

01:34:17 9 What the law does demand -- Headwater has met that
01:34:22 10 and exceeded that on every issue covered by Defendants' MIL
01:34:26 11 No. 1. And because expert testimony is not required, we
01:34:31 12 also went above and beyond to cite other types of evidence,
01:34:38 13 and I'll go through a little bit of that now.

01:34:39 14 So as I detailed, Centricut, that only stands for
01:34:46 15 the proposition that for the issues of infringement and
01:34:50 16 invalidity for complex technical cases only, not every
01:34:54 17 case, there is an expert opinion required on the claim
01:34:57 18 mapping. And we agree with that. That is -- that is -- we
01:35:03 19 followed that in this case. Their MIL is not about
01:35:06 20 claim -- is not about infringement at all.

01:35:08 21 The issue with their MIL is with regard to not
01:35:12 22 products that infringe but products that are licensed,
01:35:15 23 namely ItsOn, whether ItsOn practiced.

01:35:18 24 Now, that relates to two issues in the case,
01:35:20 25 marking and secondary considerations.

01:35:22 1 For marking, the Arctic Cat rule is that
01:35:29 2 Defendants have a burden of production to identify products
01:35:36 3 they practice.

01:35:36 4 They served us with a letter. That letter
01:35:40 5 identified all the patents as practicing. And they needed
01:35:44 6 to have a good-faith basis -- that's what's Arctic Cat
01:35:50 7 requires -- to meet that burden of production. And in this
01:35:54 8 case, they said that the ItsOn products do practice in the
01:35:58 9 letters, and they needed a good-faith basis to do so.

01:36:01 10 And now many months later, they've maintained that
01:36:06 11 position. And, in fact, filed a motion for summary
01:36:08 12 judgment that rests on that position, Your Honor. It rests
01:36:11 13 on the position that Headwater's -- rather -- sorry,
01:36:15 14 ItsOn's products the patents, and, therefore, there's a
01:36:20 15 marking obligation triggered.

01:36:22 16 Now --

01:36:22 17 THE COURT: Mr. Mirzaie --

01:36:23 18 MR. MIRZAIE: Yeah.

01:36:24 19 THE COURT: -- does your client contend that ItsOn
01:36:27 20 practices any of the asserted patents?

01:36:29 21 MR. MIRZAIE: Yes, Your Honor.

01:36:31 22 THE COURT: And what is -- what is the basis for
01:36:36 23 that contention?

01:36:37 24 MR. MIRZAIE: Your Honor, the -- Mr. Rosenthal is
01:36:40 25 correct that my client does not contend that it practices

01:36:44 1 the '613 patent, but it does contend that it practices the
01:36:50 2 other two patents. And the basis of that contention is --
01:36:56 3 there's several pieces of evidence.

01:36:58 4 The first piece of evidence is the marking page
01:37:02 5 that ItsOn has had for a very long time. That lists the --
01:37:10 6 the patents that are practiced by ItsOn. That's been
01:37:12 7 around for years. The Defendants have had that list.
01:37:14 8 They've deposed the people that were involved in creating
01:37:17 9 that list.

01:37:18 10 Beyond that list, though -- and we submit that
01:37:21 11 that -- that's enough in terms of the marking issue, and
01:37:26 12 the reason why -- but there's lot more -- but the reason
01:37:31 13 why that's enough is that what Arctic Cat tells us is that
01:37:35 14 where the Plaintiff -- after the Defendant has met their
01:37:38 15 burden of production, where the Plaintiff disputes that the
01:37:42 16 licensed product practices it, then that triggers a burden
01:37:47 17 of proof and persuasion to prove otherwise.

01:37:50 18 We did that with the '613. That's not the basis
01:37:52 19 of Defendants' MIL. We provided expert opinions on the
01:37:55 20 '613 about the limitation that's not met.

01:37:57 21 Where the Plaintiff concedes and stipulates that a
01:38:01 22 licensed product is practiced by a particular patent --
01:38:05 23 then there's just an agreement between the parties. And
01:38:08 24 the Defendants haven't cited a case that -- at that point
01:38:11 25 the Defendant -- the Plaintiff has to provide some type of

01:38:14 1 claim chart.

01:38:14 2 It's quite the opposite, Your Honor. All the
01:38:16 3 cases that we've been involved in -- all the cases cited,
01:38:20 4 the issue sort of goes off the table. There's no claim
01:38:23 5 charts in those cases. In fact, it's now our burden to
01:38:28 6 show that the marking obligation was satisfied. And so
01:38:32 7 that's the kind of evidence we have to show.

01:38:34 8 And so here, they had a good-faith basis, or they
01:38:41 9 were supposed to, for the Arctic Cat letter to say that for
01:38:45 10 certain patents, ItsOn did practice those patents. We
01:38:49 11 agreed. We didn't just stop there. There is the marking
01:38:52 12 page.

01:38:53 13 Beyond the marking page, there's also documents
01:38:56 14 that we've cited and produced to them. It includes
01:38:59 15 documents like the ones that are on Slides 6 through 8,
01:39:03 16 Your Honor.

01:39:03 17 These are just some examples. These are 2011,
01:39:10 18 2012, and later requirements -- documents from ItsOn, white
01:39:17 19 papers from ItsOn describing the product that they had.

01:39:18 20 There's been plenty of depositions on this issue
01:39:21 21 from the inventor, who was also at ItsOn. And what you'll
01:39:27 22 see in those documents and also based on the deposition
01:39:30 23 testimony is that the products -- it wasn't some conclusory
01:39:36 24 testimony or evidence.

01:39:39 25 In fact, the testimony and evidence from

01:39:43 1 Dr. Raleigh in the documents ties the products to claim
01:39:46 2 elements.

01:39:46 3 The '541, for example, it has the control of
01:39:51 4 background traffic. You've heard of those types of claim
01:39:55 5 elements. And what the testimony and the documents show is
01:39:58 6 that it did have that feature -- the ItsOn products had
01:40:01 7 that feature.

01:40:01 8 This is a Verizon Wireless trial readout dated
01:40:08 9 2011, based on some testing that the two parties had done.

01:40:11 10 And you'll see here there was a request that was
01:40:16 11 met for that same type of background service restriction.

01:40:19 12 Slide 8 is similar in that it describes other
01:40:22 13 parts of the claim elements. So there's plenty of evidence
01:40:25 14 that it is met. And it's not our burden to show that once
01:40:29 15 we've stipulated that an accused -- that a licensed
01:40:35 16 product, rather, does practice a patent.

01:40:37 17 Once you've done that, there is no burden that
01:40:39 18 Headwater has. Headwater had a burden on the '613 patent
01:40:44 19 to disprove that it used that, and that's not part of
01:40:51 20 Defendants' MIL No. 1 as far as we understand. There's an
01:40:54 21 agreement there, too.

01:40:55 22 So the other issue that we have -- and, again, the
01:40:59 23 crux of this is there's not a single case on this issue of
01:41:02 24 namely whether -- not infringing products but licensed
01:41:06 25 products practice the patent where a Plaintiff was required

01:41:09 1 to have expert testimony to prove that up and have to deal
01:41:14 2 with the pre-suit damages defense, Your Honor.

01:41:17 3 This is an issue that's different from
01:41:19 4 infringement. Centricut does govern the issue of expert
01:41:26 5 testimony and whether it's required in complex -- the most
01:41:29 6 complex of cases on the issue of infringement. It doesn't
01:41:32 7 apply to the issue of licensed products and whether those
01:41:36 8 are practiced. There's no burden of proof or persuasion,
01:41:38 9 but we have the evidence anyway.

01:41:40 10 THE COURT: And in what context is there an issue
01:41:48 11 about whether a licensed product practices the patent?

01:41:54 12 MR. MIRZAIE: Your Honor, do you mean which issues
01:41:57 13 in the case?

01:41:58 14 THE COURT: Well, in marking, it's never going to
01:42:00 15 be the Plaintiff's burden to show that the product
01:42:05 16 practices the patent.

01:42:07 17 MR. MIRZAIE: Precisely, Your Honor.

01:42:08 18 THE COURT: You're simply either admitting it or
01:42:12 19 denying it.

01:42:12 20 MR. MIRZAIE: Exactly, Your Honor.

01:42:14 21 THE COURT: But what does that have to do with the
01:42:17 22 question we're dealing with here where their motion in
01:42:20 23 limine is saying that you should not be allowed to
01:42:24 24 represent that ItsOn practices the patent if you don't have
01:42:30 25 evidence to support that?

01:42:31 1 MR. MIRZAIE: Well, I believe that -- the
01:42:33 2 Defendants don't come out and state it, but what we can
01:42:36 3 glean from their briefing is that they want to eliminate
01:42:41 4 background facts and facts that concern secondary indicia,
01:42:47 5 Your Honor.

01:42:47 6 For secondary indicia, we have pointed to evidence
01:42:51 7 about copying. That's the subject of Defendants' MIL No.
01:42:55 8 2. We've pointed to evidence of long-felt need, Your
01:42:59 9 Honor. We've pointed to evidence of praise for patented
01:43:02 10 features. We've pointed to all that evidence, and the key
01:43:06 11 point there, Your Honor, and I think that's really what
01:43:08 12 they're trying to get at even though they don't come out
01:43:10 13 and say it, I think they -- if they believe that if they
01:43:15 14 win on this motion, then they're going to come back and
01:43:19 15 say, well, some of our secondary consideration evidence
01:43:22 16 needs to come out.

01:43:23 17 I'll let Mr. Rosenthal address that question, but
01:43:26 18 that was our understanding of sort of the impact of this.
01:43:29 19 I'd love to hear if that's not true.

01:43:31 20 And on that question, the only other question we
01:43:36 21 think that this could be relevant to in terms of an actual
01:43:43 22 issue on validity, infringement, or damages, the important
01:43:45 23 point there, Your Honor, is that the burden of production
01:43:47 24 and persuasion are flipped from Arctic Cat.

01:43:51 25 And on that issue, what we know from the Federal

01:43:54 1 Circuit is that for secondary indicia, the burden of
01:43:58 2 persuasion, because it's an issue of validity, remains with
01:44:01 3 the challenger. The patentee just bears the burden of
01:44:05 4 production.

01:44:05 5 So all the same evidence that we showed goes well
01:44:08 6 beyond the burden of production, which, again, for both
01:44:11 7 marking and Defendants' burden of production and secondary
01:44:15 8 indicia and Headwater's burden of production, it just
01:44:19 9 requires having a good-faith basis in identifying a
01:44:22 10 practicing product that's licensed.

01:44:24 11 And we did that by saying that ItsOn is licensed
01:44:28 12 for the '541 and the '042, and not the '613. And the
01:44:35 13 burden of proof and persuasion stays with Defendants. For
01:44:41 14 their part, they don't have any evidence whatsoever, expert
01:44:43 15 or otherwise, trying to disprove that the ItsOn products
01:44:49 16 practice the '541 and the '042. They have no evidence.

01:44:52 17 And there's a reason why, Your Honor, because they
01:44:54 18 are taking the position, as you've probably read -- seen
01:45:00 19 today and read in their MSJ of marking, that the -- for the
01:45:05 20 '541 and '042, ItsOn did practice. And that's a necessary
01:45:10 21 argument that they need to make in good faith to trigger
01:45:12 22 even having -- even having that defense in the first place.

01:45:15 23 Now, we think that that motion fails for multiple
01:45:19 24 reasons, but the statement from Mr. Rosenthal that we
01:45:23 25 heard, I think, today for the first time is an absolute

01:45:28 1 contradiction to what we've heard so far.

01:45:31 2 I think he's said that they aren't saying that the
01:45:34 3 ItsOn products practice the '541 and '042. That's the
01:45:37 4 first we've heard of it, and I think the record is clear
01:45:39 5 that from the moment they sent us their Arctic Cat letter,
01:45:43 6 they were required to and did say that they have a
01:45:45 7 good-faith basis to believing that the '541 and '042
01:45:50 8 patents are practiced by ItsOn. And they've maintained
01:45:53 9 until today in the moment they filed the motion for summary
01:45:57 10 judgment on pre-suit damages, which rests on that premise.

01:46:01 11 And so for secondary indicia, we don't have any
01:46:08 12 burden to show evidence of mapping claim elements, let
01:46:12 13 alone through expert opinion. And you'll find no case
01:46:16 14 cited by Defendants stating otherwise.

01:46:21 15 The ZUP case and plenty others that you see on
01:46:26 16 Slide 13 clearly shows the opposite. The burden of
01:46:29 17 persuasion remains with the challenger to disprove it.

01:46:33 18 We just had a burden of production of identifying
01:46:35 19 it. We've done that through the rog responses. We've done
01:46:39 20 that with the marking page. We've done that with
01:46:41 21 Dr. Raleigh's testimony. We've done that with Krista
01:46:48 22 Jacobsen's testimony. We've done that by producing and
01:46:51 23 citing documents about ItsOn's products that actually map
01:46:55 24 to the claim elements -- that have a nexus to the claim
01:46:59 25 elements.

01:46:59 1 Now --

01:46:59 2 THE COURT: Are you saying that the ZUP case deals
01:47:03 3 with whether a product practices the patent?

01:47:07 4 MR. MIRZAIE: The ZUP case deals with the burden
01:47:10 5 of -- the burdens on the issue of secondary indicia. And
01:47:17 6 what it does deal with is, you know, whose burden is it on
01:47:21 7 that issue. That's the only other issue besides marking
01:47:25 8 that we're aware of that this can even relate to, Your
01:47:28 9 Honor.

01:47:28 10 And so on that issue, what this makes clear -- and
01:47:32 11 there's numerous other cases, too, that make clear -- there
01:47:36 12 is no case that suggests that the patentee, in order to
01:47:40 13 have an argument or evidence concerning secondary
01:47:48 14 considerations, that they need to do a claim mapping first.
01:47:48 15 And that, by the way, Your Honor, is regardless of the
01:47:52 16 marking issue.

01:47:52 17 THE COURT: I didn't hear anybody on the Defense
01:47:54 18 side talk about claim mapping at all. It was just talking
01:47:57 19 about whether there is evidence that the ItsOn product
01:48:05 20 practices the patents.

01:48:07 21 MR. MIRZAIE: Your Honor, from the briefs, and
01:48:10 22 also I think what we did hear from Mr. Rosenthal's argument
01:48:13 23 today is that you need expert testimony tying the ItsOn
01:48:21 24 product -- we needed that for these issues -- tying the
01:48:24 25 ItsOn product to a patent. And he mentioned that it needs

01:48:29 1 to tie to the claim elements. He mentioned that -- even as
01:48:33 2 he stated this morning, Your Honor, that Claim 1 is not
01:48:36 3 even good enough, which is inconsistent with the law. You
01:48:39 4 need to tie it to the claim elements of the asserted
01:48:42 5 claims, and that's just not true.

01:48:43 6 There is no case that stands for the proposition
01:48:45 7 that for -- for -- not an infringing product, but a
01:48:51 8 licensed product, a practicing product that's licensed,
01:48:56 9 those are the kinds of things that patentees use to try to
01:49:00 10 prove long-felt need, to try to prove copying, and try to
01:49:04 11 prove praise and other secondary indicia.

01:49:09 12 There is no case that stands for the proposition
01:49:12 13 that for that issue -- for the patentee or the patentee's
01:49:18 14 licensee's products, you need to do a claim mapping or that
01:49:22 15 you need to have any kind of expert testimony at all.
01:49:27 16 Centricut does not stand for that proposition, claim
01:49:31 17 mapping or otherwise.

01:49:31 18 And so there's a mere burden of production which
01:49:34 19 applies to whether there is a practicing product, and it
01:49:39 20 also applies to the nexus, Your Honor. And this is the
01:49:41 21 next point I wanted to make.

01:49:44 22 There is a further requirement of having a nexus,
01:49:47 23 and that is part of the same requirement, actually, for
01:49:51 24 secondary indicia. And what the WBIP case on Slide 14
01:49:58 25 shows is that -- they use the example of commercial

01:50:00 1 success, but it certainly stands for the broader
01:50:04 2 proposition of secondary considerations in general. They
01:50:10 3 may be linked with a nexus to a, quote, individual element.

01:50:10 4 And we have evidence of that, too, and that's part
01:50:14 5 of the evidence that I showed earlier. We have evidence
01:50:17 6 through the documents, through the witness testimony that
01:50:23 7 the background/foreground limitations, for example, that
01:50:28 8 were in the ItsOn product literature, that was, you know,
01:50:33 9 in the -- that was actually in the ItsOn product. And so
01:50:37 10 what our evidence shows -- and the nexus actually -- there
01:50:42 11 is also expert testimony on that, Your Honor. Not that
01:50:44 12 that's required, but we do have expert testimony on the
01:50:46 13 nexus.

01:50:47 14 We also have testimony, as we show on this slide,
01:50:53 15 about -- concerning some of the dealings and communications
01:50:57 16 between Verizon and ItsOn, about 15 or so years ago, and
01:51:03 17 this is regarding Mr. Russell. And Defendants have filed
01:51:07 18 another MIL on related issues on this, but we cite to this
01:51:12 19 evidence that you see here for, among other things, this
01:51:16 20 secondary indicia. And we have evidence, including through
01:51:18 21 expert testimony, about the fact that there's a nexus
01:51:22 22 there.

01:51:23 23 What we -- what we don't have -- the only thing we
01:51:27 24 don't have is expert testimony mapping all the claim
01:51:31 25 elements or, like, a majority of the claim elements to the

01:51:37 1 ItsOn products.

01:51:37 2 I will concede that. We do have some expert
01:51:43 3 testimony of -- Dr. Wesel, for example, did say that based
01:51:48 4 on his citations, and Mr. Rosenthal's exhibit that he
01:51:53 5 handed up showed this, as well -- based on his review of
01:51:56 6 all this evidence, including the evidence that you see on
01:51:58 7 the screen, including the evidence concerning some other
01:52:01 8 ItsOn-related documents and the marking page, that he
01:52:06 9 understands that it's met, that the products -- ItsOn
01:52:11 10 products do practice the '541 patent.

01:52:19 11 And what he doesn't have is something that you
01:52:22 12 don't need, which is an element-by-element claim mapping,
01:52:28 13 mapping all the claim elements to the ItsOn product.

01:52:30 14 THE COURT: You know, I don't have any doubt that
01:52:35 15 a fact witness like, I guess, Mr. Russell is who you have
01:52:40 16 on the screen there, can testify as to whether or not a
01:52:45 17 product has certain features, but to say whether those
01:52:51 18 features meet the limitations of a patent claim, I think,
01:52:57 19 is inherently an opinion.

01:52:59 20 So I'm having trouble understanding how you would
01:53:05 21 do that without what you're calling expert testimony.
01:53:12 22 Whether it's an expert or not, it has to be someone who can
01:53:16 23 provide an opinion.

01:53:17 24 MR. MIRZAIE: Well, Your Honor, I think the key
01:53:19 25 point there -- I appreciate the question -- is that what's

01:53:21 1 not required is an element-by-element claim mapping for
01:53:26 2 ItsOn products by an expert witness for any issue in the
01:53:29 3 case. That may be required for infringement, but not for
01:53:34 4 the ItsOn products.

01:53:34 5 On nexus, which I showed here on Claim 14, that --
01:53:40 6 there just has to be some type of linkage to even an
01:53:44 7 individual element, like background/foreground. And I do
01:53:49 8 think that we have plenty evidence of that, including
01:53:51 9 expert opinion.

01:53:53 10 So we do have nexus. You know, in our expert
01:53:57 11 reports, if -- we're certainly obviously -- we're going to
01:54:01 12 live by Rule 26, and the experts do cite the documents
01:54:06 13 about background/foreground from ItsOn for this very
01:54:10 14 reason.

01:54:12 15 Dr. Wesel cites the documents, including documents
01:54:15 16 of the kind that I showed on Slides 6 through 8, and he
01:54:22 17 goes through the various ItsOn-related documents to tell
01:54:28 18 the overall story about ItsOn. And he -- after he cites to
01:54:35 19 all the evidence about ItsOn and the background story,
01:54:38 20 including Mr. Russell's place in it, he then says that he
01:54:44 21 understands based on the evidence, including the
01:54:47 22 Defendants' Arctic Cat letter, including, you know, the
01:54:51 23 marking page, including other evidence, that there is
01:54:57 24 products from ItsOn that practice the '541, and that's more
01:55:00 25 than enough for Headwater's obligations for secondary

01:55:08 1 indicia.

01:55:08 2 Nexus -- we do have expert testimony on nexus, and
01:55:14 3 we're certainly going to live by Rule 26. If this MIL is
01:55:18 4 just about applying Rule 26 to the expert opinions on
01:55:25 5 ItsOn, then we're certainly going to live by that. We're
01:55:28 6 not going beyond our expert reports on that.

01:55:30 7 I think the key issue -- among several, the key
01:55:37 8 issue is what is required from the experts on whether ItsOn
01:55:40 9 practices. And the case law suggests that on -- or states
01:55:45 10 that on secondary indicia, it's just a burden of production
01:55:50 11 of having a good-faith belief that one does.

01:55:54 12 We have much more than that, and we have the nexus
01:55:56 13 in our expert reports.

01:55:58 14 THE COURT: So you would direct the Court to that
01:56:02 15 Centricut case and the ZUP case?

01:56:07 16 MR. MIRZAIE: Yes, Your Honor. Centricut, I
01:56:11 17 believe, is the key or only case cited by Defendants on
01:56:15 18 this proposition of expert testimony being required, but
01:56:19 19 what's clear from Centricut and all the cases that came
01:56:23 20 before and after it is that that's not talking about
01:56:26 21 secondary indicia and what the patent owners' burdens are
01:56:32 22 there. It's not talking about marking, as Your Honor
01:56:36 23 correctly stated, I think, a few minutes ago.

01:56:39 24 That's talking about the patentee's burden on
01:56:47 25 infringement or the Defendants' burden on invalidity of

01:56:50 1 doing claim mapping in a, quote, complex -- technically
01:56:53 2 complex case.

01:56:54 3 Now, you could debate whether this is a
01:56:56 4 technically complex case or not, but setting that aside,
01:57:00 5 Centricut just does not apply to any obligation or burden
01:57:03 6 that Headwater has beyond infringement. And on
01:57:08 7 infringement, we certainly have a claim mapping, and
01:57:10 8 Defendants have never stated otherwise in our expert
01:57:15 9 report.

01:57:16 10 So I would -- I would point to those cases.

01:57:21 11 I would also point to the WBIP case that makes
01:57:25 12 clear that for nexus -- again, the burden of persuasion on
01:57:30 13 validity rests with Defendant at all times. That's what
01:57:34 14 the Federal Circuit case law says.

01:57:35 15 But on nexus, it could be linked to just an
01:57:38 16 individual element, and there's no claim mapping required
01:57:40 17 there. But we have expert testimony, and we'll live by
01:57:43 18 that, on that issue.

01:57:44 19 I don't think that there's a case, Your Honor,
01:57:46 20 that requires that the only kind of evidence that you're
01:57:49 21 allowed to present on nexus is expert testimony. I don't
01:57:53 22 think that you'll find that case.

01:57:56 23 But we -- you know, we have it in our -- there is
01:58:01 24 evidence cited on that in our expert reports, but the law
01:58:07 25 does not demand that for nexus, you know, there has to be

01:58:10 1 expert opinions and only expert opinions.

01:58:14 2 We have opinions citing that nexus, but we also
01:58:18 3 have plenty of other evidence about the ItsOn products
01:58:22 4 having, you know, background/foreground restrictions and
01:58:27 5 other issues.

01:58:27 6 And the other correction I'll make is that on the
01:58:30 7 '042 patent, Mr. Rosenthal said that -- I think he said
01:58:33 8 that we concede that it doesn't practice. But that's
01:58:36 9 incorrect. We've never conceded that it doesn't practice
01:58:40 10 in any -- in any place.

01:58:42 11 But that issue just blends together with the '541
01:58:45 12 issues. And these are the relevant cases -- and these
01:58:49 13 cases and their progeny are sort of, you know, the cases
01:58:52 14 that govern this issue.

01:58:54 15 And, of course, with the nexus issue, Your Honor,
01:58:57 16 that's something that case after case -- and I don't think
01:58:59 17 Defendants argue otherwise -- make clear that that goes to
01:59:03 18 weight, not admissibility.

01:59:07 19 So if we had no evidence of nexus, expert or
01:59:12 20 beyond the expert report, that'd be one thing, but that's
01:59:16 21 not this case, and that's not what Defendants are arguing,
01:59:19 22 as far as we understand it. And it's just not consistent
01:59:22 23 with the record at all. As long as you have some evidence,
01:59:26 24 then the nexus part, you know, goes to weight, not
01:59:29 25 admissibility.

01:59:30 1 And the WARF case that you see here on Slide 17
01:59:40 2 stands for that proposition, as well. This is WARF v.
01:59:46 3 Apple at 135 F.Supp.3d at 876 to '77. There's other cases
01:59:55 4 on this issue, as well.

01:59:56 5 But -- so I think bottom line is that for issues
02:00:01 6 beyond infringement, Your Honor, the case law makes clear
02:00:04 7 that there is no element-by-element claim mapping required.
02:00:09 8 And Defendants, for their part, have certainly not pointed
02:00:13 9 to a case that argues that or shows that for opinion -- for
02:00:16 10 opinion testimony especially. And we've gone well beyond
02:00:20 11 what we're required to do, both for whatever issues we
02:00:28 12 can -- whatever issues relate to whether ItsOn practices,
02:00:32 13 we -- it seems clear to us that the only two issues are
02:00:35 14 marking, for which we don't have any burden once we concede
02:00:39 15 it, and for -- the relevant burden there was just to show
02:00:46 16 that there was sufficient marking or notice.

02:00:48 17 And then for secondary indicia, we just have a
02:00:51 18 burden of production of identifying it.

02:00:54 19 Defendants' burden is for persuasion to show that
02:00:56 20 there is none, and they have zero expert testimony or
02:00:59 21 evidence on that. That's not really the basis of this MIL
02:01:01 22 anyway, which brings me to sort of the final point here,
02:01:05 23 which is that if you -- we think this is an improper MIL,
02:01:10 24 too, in general because the MIL is essentially saying that
02:01:18 25 because there's insufficient evidence from Headwater that

02:01:22 1 ItsOn products practice, Headwater cannot tell the jury
02:01:26 2 that ItsOn products practice.

02:01:28 3 And the extension of various arguments that
02:01:31 4 Defendants are making -- I'd love for Mr. Rosenthal to tell
02:01:34 5 me that this is wrong -- is that, therefore, certain
02:01:38 6 secondary indicias can't be shown by Headwater -- maybe it
02:01:42 7 has an impact to other issues, such as maybe willfulness or
02:01:46 8 something, and that's just not -- not the case here. And
02:01:48 9 because of that, we think it's an improper summary judgment
02:01:54 10 seeking to exclude evidence concerning secondary indicia
02:02:00 11 and other things. And that just goes well beyond the scope
02:02:05 12 of what MILs should be.

02:02:06 13 But the key is that it rests on a legal -- legal
02:02:10 14 requirements that are completely inconsistent with the
02:02:13 15 actual law for practicing products that are licensed and
02:02:19 16 what Headwater's burdens are.

02:02:21 17 THE COURT: Isn't the whole question that's being
02:02:23 18 presented by their motion whether it is a practicing
02:02:26 19 product?

02:02:27 20 MR. MIRZAIE: The question that's being presented
02:02:29 21 by their motion is whether we have competent evidence of it
02:02:33 22 being a practicing product.

02:02:34 23 THE COURT: All right. Do you?

02:02:36 24 MR. MIRZAIE: We do because Defendants' argument
02:02:39 25 is that the only way to have that is through expert

02:02:43 1 testimony and mapping, and that is an incorrect premise of
02:02:47 2 law.

02:02:47 3 And also the Defendants are obviously trying to
02:02:50 4 have it both ways, Your Honor, by telling us and
02:02:53 5 maintaining the position that -- that they believe that the
02:02:58 6 '541 and '042 practice -- are practiced by ItsOn, and then
02:03:03 7 when it comes to -- also at the same time saying that
02:03:06 8 there's no competent evidence that it does so that they can
02:03:10 9 sort of have it both ways.

02:03:11 10 THE COURT: You know, that is a marking question
02:03:18 11 that certainly we can take up in connection with the
02:03:20 12 motions on that.

02:03:21 13 If I'm understanding your position properly on
02:03:23 14 this MIL, you're not arguing that you have an opinion from
02:03:30 15 anyone that ItsOn practices either the '042 or the '541,
02:03:37 16 you're saying that you don't need an opinion?

02:03:39 17 MR. MIRZAIE: Well, to be clear, Your Honor, what
02:03:42 18 we're saying is that you don't -- we don't have an opinion
02:03:46 19 mapping all the claim elements.

02:03:48 20 THE COURT: I'm not asking about that. You keep
02:03:50 21 bringing up whether something is mapping all the claim
02:03:55 22 elements.

02:03:55 23 I'm just saying do you have testimony from anyone
02:03:57 24 that you'll be offering that it practices the patent?

02:04:01 25 MR. MIRZAIE: Yes. We have opinions and other

02:04:06 1 testimony from non-experts that the ItsOn products do
02:04:11 2 practice, for example, the '541.

02:04:12 3 THE COURT: And who -- who are those?

02:04:14 4 MR. MIRZAIE: So Dr. Wesel -- well, I'll start
02:04:21 5 with Dr. Raleigh, the inventor.

02:04:23 6 Dr. Raleigh, the inventor, he will talk about --
02:04:29 7 or plans to talk about ItsOn -- the ItsOn products, the
02:04:34 8 technical configurations of the ItsOn products, using
02:04:39 9 documents that we've long-produced about exactly what those
02:04:42 10 products and services entailed.

02:04:46 11 Then Dr. Raleigh and Krista Jacobsen will have
02:04:50 12 testimony that based on an analysis of all of the product
02:04:55 13 literature and technical ability of the products years
02:05:01 14 ago -- roughly 10-plus years ago, there was a conclusion by
02:05:09 15 ItsOn to add the '541 patent, for example, and the '042
02:05:11 16 patent, by the way, to the marking page. And we have the
02:05:15 17 marking page that shows that also.

02:05:20 18 THE COURT: Did Dr. Raleigh in any of his
02:05:23 19 depositions testify that the ItsOn products practiced
02:05:28 20 either the '042 or the '541?

02:05:30 21 MR. MIRZAIE: I believe he did, Your Honor. I
02:05:34 22 believe he did say that based on the marking page, because
02:05:38 23 those patents were and have been for many, many years on
02:05:41 24 the marking page, what that meant was there was a
02:05:43 25 determination by ItsOn and its lawyers years ago, based on

02:05:49 1 the product literature -- there was a determination that
02:05:52 2 the ItsOn products did practice, and that's why it's been
02:05:56 3 on the marking page for such a long time. And based on all
02:06:00 4 of that evidence and including Defendants' Arctic Cat
02:06:04 5 letter and other evidence, Dr. Wesel then, for his part,
02:06:08 6 cites that evidence and says that his understanding is that
02:06:14 7 the ItsOn products practice the '541.

02:06:16 8 THE COURT: Why does he say it's my understanding
02:06:18 9 instead of it's my opinion?

02:06:19 10 MR. MIRZAIE: I'm not sure, Your Honor, but I also
02:06:25 11 don't think that it matters. It is in his expert report,
02:06:28 12 and what it's preceded by in many, many pages in sections
02:06:32 13 of his report is the same type of evidence that I just
02:06:35 14 discussed, namely, the ItsOn story, the ItsOn technical
02:06:39 15 documents, the marking page, and that -- that's what
02:06:42 16 precedes that one sentence that is quoted in Defendants'
02:06:46 17 brief.

02:06:47 18 So perhaps he could have been a bit more, you
02:06:53 19 know, artful in his testimony on that issue. But, again,
02:06:56 20 we don't believe that there is expert testimony required
02:07:00 21 for whether licensed products practice.

02:07:05 22 In any event, he cites the relevant documents and
02:07:09 23 has that opinion anyway based on the fact -- the facts of
02:07:13 24 the case, including product literature and the marking page
02:07:17 25 and what went into it, and all of that is certainly more

02:07:21 1 than enough for whether -- for Headwater's part as to
02:07:26 2 whether the ItsOn products practice.

02:07:29 3 THE COURT: All right. Are there -- besides
02:07:34 4 Centricut and ZUP, what -- what other case law do you want
02:07:38 5 the Court to examine in connection with your argument?

02:07:43 6 MR. MIRZAIE: I think that the other cases are
02:07:46 7 WBIP v. Kohler Co. That's at 829 F.3d 1317. That's a
02:07:54 8 Federal Circuit case from 2016. This is the case that I
02:07:58 9 just showed Your Honor that does talk about the extent to
02:08:04 10 which you -- there's any nexus required is -- can be for a
02:08:06 11 claim element. And for -- for that, we certainly have
02:08:12 12 non-expert and expert testimony. So that's one more case.

02:08:15 13 And then on nexus and in terms of -- for secondary
02:08:22 14 indicia, whether products practice, which is the only other
02:08:25 15 issue that we could think this matters for, I think
02:08:30 16 Quanergy Systems, which is at 24 F.4th 1406. And this is
02:08:36 17 at 1417 specifically for a pincite. It's a Federal Circuit
02:08:41 18 case from 2022. It says that evidence of secondary
02:08:46 19 considerations must always be considered before reaching a
02:08:48 20 determination on obviousness, and that the nexus
02:08:51 21 requirement goes to the weight that the evidence should be
02:08:54 22 given, not the admissibility.

02:08:55 23 And there's plenty of cases from this district, as
02:08:59 24 well, as Your Honor knows, on that point.

02:09:03 25 And that brings me to perhaps the final point,

02:09:05 1 which is we didn't hear any argument today and there's not
02:09:08 2 really any in the briefs either about any prejudice that
02:09:12 3 would be suffered under Rule 403 by presenting this. If
02:09:17 4 anything, there'd be prejudice the other way, because we --
02:09:20 5 all the requirements have been met from Headwater's part to
02:09:24 6 present expert and non-expert opinions according to the law
02:09:27 7 on all these non-infringement -- issues that go beyond the
02:09:31 8 issue of infringement, which is what this MIL is about.

02:09:36 9 And because the law also says that evidence of
02:09:38 10 secondary considerations must be considered when they're
02:09:42 11 available, we would suffer great prejudice actually if this
02:09:47 12 was precluded.

02:09:48 13 THE COURT: All right. Thank you, Mr. Mirzaie.

02:10:04 14 MR. ROSENTHAL: Your Honor, I have a few
02:10:06 15 responses.

02:10:07 16 THE COURT: All right.

02:10:07 17 MR. ROSENTHAL: First, I want to clear one thing
02:10:10 18 up. I must have heard about 20 times during that
02:10:14 19 presentation that we have agreed that the ItsOn product
02:10:24 20 practices these patents. That has never, ever, ever been
02:10:27 21 the case. We have not once said that, not in a single
02:10:28 22 piece of paper, correspondence, anything. We have never
02:10:32 23 said it.

02:10:32 24 The only thing that we did is we wrote a letter in
02:10:36 25 May of 2024, which is Exhibit 14, which is our Arctic Cat

02:10:41 1 letter. And I saw some quotes of that Arctic Cat letter up
02:10:44 2 on the screen, and none of those said it. What we said is
02:10:47 3 you have said that you practice your patents. Well, based
02:10:51 4 on that -- and I'll read exactly the language so I'm not
02:10:55 5 paraphrasing it.

02:10:57 6 THE COURT: I understand the issue about that.
02:10:59 7 The Arctic Cat case talks about the Defendant having a
02:11:05 8 belief that the unmarked product practices the patent, and
02:11:12 9 obviously it is a low bar, but I know that the -- y'all are
02:11:17 10 fighting back and forth.

02:11:19 11 Whether what you have done is enough to satisfy
02:11:24 12 your Arctic Cat burden is an issue we'll take up otherwise.
02:11:30 13 But I do understand that you have not said the words
02:11:35 14 that -- that they're suggesting.

02:11:38 15 MR. ROSENTHAL: And thank you, Your Honor.

02:11:40 16 And I would also direct the Court to your decision
02:11:42 17 in the Barkan Wireless case, 2021 Westlaw 8441751, in which
02:11:51 18 you said that the bar for Arctic Cat is whether or not
02:11:55 19 there -- they have identified products that, quote,
02:11:58 20 potentially practice the asserted patents.

02:12:01 21 And in this case, we have a Plaintiff who said at
02:12:06 22 that time we practice all of our patents. And so our
02:12:10 23 response was, okay, well, then, you've got a marking
02:12:12 24 obligation. And that was the end of it.

02:12:15 25 And so at the core, this issue has nothing to do

02:12:17 1 with that. This issue that is presented by our motion
02:12:20 2 is -- I think you said it very, very well -- it's whether
02:12:23 3 they have competent evidence of any kind that they practice
02:12:30 4 the asserted claims of these two patents.

02:12:32 5 Now, you asked several times what that evidence
02:12:34 6 was, and finally at the end of the presentation, counsel
02:12:37 7 gave you some examples of what he relied on. There are a
02:12:40 8 few categories.

02:12:41 9 First, he said I've got Dr. Raleigh. Dr. Raleigh
02:12:45 10 said, well, because it's on our page, therefore, we
02:12:48 11 practice.

02:12:49 12 Well, that's not competent evidence for a couple
02:12:52 13 of reasons. First of all, as this Court has held in
02:12:56 14 several cases, including the SSL case that we cited in our
02:13:00 15 brief on Page 2 of our MIL, fact witnesses can't offer
02:13:07 16 expert opinion testimony. And expert opinion testimony
02:13:11 17 includes whether or not this particular product practices.
02:13:14 18 That's doubly true here where this particular fact witness,
02:13:17 19 Dr. Raleigh, stated over and over and over again that he
02:13:22 20 cannot assess infringement without experts in this
02:13:26 21 particular case with respect to these patents. And he did
02:13:28 22 that because he was trying to explain away why he didn't
02:13:32 23 sue or write a letter for 10 years. And he said in that
02:13:35 24 context, I couldn't because you need experts to understand
02:13:38 25 whether there's infringement or not.

02:13:40 1 So that's not competent evidence for that reason.

02:13:43 2 It's not competent evidence for the second reason,
02:13:47 3 which is we actually -- he's relying entirely on the
02:13:52 4 marking page. So we asked the person that put together the
02:13:54 5 marking page, Ms. Jacobsen. And she said: All we know is
02:13:58 6 we would have done one claim or more.

02:14:01 7 THE COURT: And, Mr. Rosenthal, you don't have to
02:14:03 8 repeat the argument you've already made.

02:14:05 9 MR. ROSENTHAL: Fair enough. Thank you.

02:14:07 10 So, Your Honor, what I do want to talk about in
02:14:10 11 direct response to what counsel said is, number one, there
02:14:15 12 was a -- well, I don't remember the word right now, but an
02:14:18 13 argument that we are not making. They keep saying we don't
02:14:21 14 have to have an expert do a claim-by-claim mapping. That's
02:14:25 15 not what we're arguing. What we're saying is there's got
02:14:28 16 to be something, and we have experts here who have said
02:14:31 17 nothing.

02:14:32 18 And by the way, I do want to -- one point that I
02:14:35 19 was surprised to hear. Counsel said, well, I know that
02:14:39 20 Dr. Wesel said understand, but he really means an opinion.
02:14:44 21 That was just a -- you know, that was just a poor choice of
02:14:46 22 words, in effect.

02:14:47 23 If I could have the ELMO, please. Thank you very
02:14:50 24 much.

02:14:50 25 This is Dr. Wesel's testimony. I took his

02:14:52 1 deposition. I asked him about that word. I said
02:15:02 2 somewhere -- I said: You believe that the ItsOn software
02:15:07 3 practiced the asserted claims, right?
02:15:08 4 He said: Yes, that's my understanding.
02:15:10 5 Have you done any analysis of the ItsOn software?
02:15:13 6 I have not.
02:15:14 7 Okay. That's your understanding, though.
02:15:17 8 Correct?
02:15:17 9 That's my understanding.
02:15:19 10 I mean, I asked him if he'd done any analysis, and
02:15:21 11 he said no. He's just stating an understanding.
02:15:24 12 Counsel said there's pages and pages of analysis
02:15:26 13 than precedes it. That is false.
02:15:28 14 The only thing that they've ever pointed to is
02:15:31 15 Paragraph 84 and 85, which immediately precede 86, and
02:15:36 16 those simply say -- and I showed Your Honor the pages,
02:15:40 17 nothing to hide -- they simply said it's marked on the
02:15:43 18 marking page. And it all comes down to that.
02:15:45 19 Raleigh says because it's marked. Jacobsen says
02:15:48 20 because it's marked. Wesel says because it's marked. And
02:15:53 21 de la Iglesia says because Wesel says. It all comes down
02:15:56 22 to the very simple fact that because they put this on their
02:15:59 23 marking page, they get to tell the jury that they're
02:16:01 24 practiced.
02:16:01 25 And this is a proper MIL because as soon as they

02:16:05 1 say that their product practiced these claims, it's not
02:16:11 2 just about secondary considerations. It's not just about
02:16:15 3 willfulness, although it's also about those things. All of
02:16:19 4 a sudden these patents carry an air of significance, of
02:16:21 5 commercial viability, of -- as though there's something to
02:16:24 6 these claims because they practice them. And that's --
02:16:27 7 there's simply no evidence of that.

02:16:29 8 And so we are not asking for a claim chart. We're
02:16:31 9 not asking for a mapping. We're asking for some piece of
02:16:34 10 competent evidence that someone has looked at these
02:16:38 11 particular claims and decided that these particular claims
02:16:43 12 are in the product based on looking at some evidence. And
02:16:46 13 that has not happened in this case.

02:16:48 14 I do want to address the Centricut case because
02:16:51 15 that was a centerpiece of the discussion. The Centricut
02:16:56 16 case says it is possible. There may be in some
02:16:59 17 circumstances a situation where you don't need expert
02:17:01 18 testimony. If you, for instance, had a patent on a chair
02:17:04 19 and I say, hey, my chair has three legs and it's got a seat
02:17:08 20 and it's got a back and that's all that's in the claim,
02:17:11 21 ordinary jurors could understand, okay, that's enough for
02:17:14 22 me to conclude.

02:17:15 23 But the vast majority of cases, including complex
02:17:19 24 patents -- and I got to say there's literally thousands of
02:17:21 25 pages of expert reports on whether or not the accused

02:17:25 1 products infringe, based on analysis of source code,
02:17:27 2 technical documents, all of this stuff that is the subject
02:17:30 3 of this case, and they're saying when it comes to their own
02:17:33 4 product, they literally don't have to do anything.

02:17:36 5 We're not saying the bar is the same. We're
02:17:38 6 saying there is a bar. There is some modicum of evidence
02:17:42 7 that must be presented for them to proceed to tell the jury
02:17:45 8 that these two claims were actually used. And they have --
02:17:52 9 counsel said Defendants aren't saying we have zero
02:17:55 10 evidence. That is exactly what we're saying. There is
02:17:57 11 zero competent evidence of practice in this case. There is
02:18:00 12 innuendo. There is the fact that a patent made it on a
02:18:04 13 marking page.

02:18:05 14 I don't want to overstay my welcome. Let me just
02:18:09 15 make sure that there's nothing else.

02:18:11 16 Oh, this whole point about nexus. They said,
02:18:15 17 well, nexus does not need to be tied to the claim as a
02:18:17 18 whole, it can be tied to individual elements. None of
02:18:20 19 their experts did that. Their experts are very, very
02:18:23 20 plain. They say: ItsOn practices, and, therefore,
02:18:26 21 evidence that ItsOn was copied is relevant. They say:
02:18:31 22 ItsOn practices, and, therefore, evidence of what Samsung
02:18:34 23 did is irrelevant.

02:18:35 24 They never say: Oh, well, because these aspects
02:18:38 25 of the claims are in there, I've tied it to that.

02:18:41 1 And counsel didn't show you any of that, they
02:18:44 2 didn't put any of that in the briefs because it didn't
02:18:48 3 happen.

02:18:48 4 And I believe that is all I have. Unless you have
02:18:50 5 other questions, Your Honor, that's all I have on this one.

02:18:53 6 THE COURT: No, I do not.

02:18:54 7 MR. ROSENTHAL: Thank you very much.

02:18:55 8 MR. MIRZAIE: Your Honor, if I could just have a
02:18:57 9 couple minutes, just a few things that I need to correct
02:19:00 10 the record on with what Mr. Rosenthal said.

02:19:02 11 THE COURT: All right. Very briefly.

02:19:03 12 MR. MIRZAIE: I appreciate it, Your Honor.

02:19:04 13 We're not going to belabor the Arctic Cat point.
02:19:11 14 They said what they said, and they can't have it both ways.
02:19:15 15 But that's not -- the Court doesn't need to decide that for
02:19:17 16 this MIL in order to deny it, Your Honor.

02:19:18 17 Again, for any issue in the case relating to
02:19:25 18 whether ItsOn practiced, which is marking, and we've, I
02:19:27 19 think, already decided we have no -- nothing to be done
02:19:28 20 there. The only other issue could be secondary
02:19:32 21 considerations, and it's only our burden of production.
02:19:34 22 There's no expert testimony requirement for ItsOn
02:19:37 23 practicing on that issue either.

02:19:43 24 Mr. Rosenthal still hasn't cited a case.
02:19:45 25 Defendants still have not cited a case for that

1 proposition. Centricut does not stand for that

2 proposition.

3 Now, in terms of nexus, Mr. Rosenthal is incorrect
4 about that issue, and I want to make sure that in addition
5 to the cases, the Court understands that we have a second
6 expert in this case, and that is Mr. de la Iglesia. He's
7 our validity expert, and I'm not exactly sure right now
8 whether this is an exhibit to our briefs on this topic, but
9 it is, I think, an exhibit to other briefs. And his report
10 at Paragraphs 421 to 437, and we can provide that -- if the
11 Court doesn't have it, we can provide it to the Court at
12 some point today.

13 Those are 17 paragraphs where he details the nexus
14 to claim elements from ItsOn, Your Honor. So I -- we
15 certainly don't want to make -- we want to make sure that
16 doesn't get lost here. And I think -- therefore, I think
17 that in summary, there's no requirement in Centricut or
18 otherwise for practicing products that are licensed.

19 So not infringement, but for practicing products
20 that are licensed, for Headwater to provide anything other
21 than the burden of production identifying it.

22 We've gone way further than that in citing
23 evidence, talking through the marking page, and actually
24 providing nexus, including with expert testimony in those
25 17 pages of Mr. DLI's report to claim elements of the '541,

02:21:32 1 for example. And while that wasn't required from us, we
02:21:34 2 went ahead and did it anyway.

02:21:36 3 And what the WBIP case makes clear is that one
02:21:41 4 element will do. And so we have gone into that linking for
02:21:46 5 nexus, and all of the other arguments go to weight, not
02:21:50 6 admissibility.

02:21:51 7 Thank you.

02:21:51 8 THE COURT: All right. Thank you, Mr. Mirzaie.

02:21:52 9 I'm going to carry this MIL. I want to look
02:21:55 10 further at both the exhibits and the cited cases.

02:22:01 11 So we can move on to Defendants' Motion in Limine
02:22:05 12 No. 2.

02:22:06 13 MR. ROSENTHAL: Thank you, Your Honor.

02:22:10 14 MR. FENSTER: Your Honor, may I just ask to be
02:22:12 15 excused?

02:22:14 16 THE COURT: You are excused.

02:22:15 17 MR. FENSTER: Thank you.

02:22:17 18 MR. ROSENTHAL: Okay. MIL No. 2, I believe, will
02:22:22 19 go much more quickly than MIL No. 1.

02:22:25 20 Our argument here on MIL No. 2 is that Headwater
02:22:33 21 has made allegations of copying, specifically copying the
02:22:38 22 ItsOn product. It is our view that those should be
02:22:42 23 excluded from this trial.

02:22:45 24 Now, the first and foremost reason is that if you
02:22:48 25 agree with us on MIL 1, that there's no competent evidence

02:22:52 1 that the ItsOn product practiced, then by definition,
02:22:54 2 copying of a non-practicing product, unless they've linked
02:22:59 3 it to something specific in the accused -- in the -- in
02:23:03 4 the -- in the claims, which they have not, they've said
02:23:06 5 that there's evidence of copying the ItsOn product as a
02:23:09 6 whole and that, therefore, that is secondary considerations
02:23:11 7 of non-obviousness.

02:23:15 8 Definitionally -- and we've cited, I think, seven
02:23:18 9 or eight cases in our -- in the opening few lines of our
02:23:22 10 brief. Definitionally, if the product doesn't practice,
02:23:25 11 copying is irrelevant. And case upon case upon case has
02:23:29 12 excluded evidence of copying in those circumstances.

02:23:33 13 So if MIL 1 is decided in our favor, MIL 2 is
02:23:37 14 necessarily decided in our favor, in our view.

02:23:39 15 However, even if MIL 1 is not decided in our
02:23:43 16 favor, there are independent reasons to not allow these
02:23:49 17 allegations of copying. Now, in the briefing, there are
02:23:53 18 two instances of copying that have been distilled down as
02:23:58 19 what's really at issue, Verizon's alleged copying and
02:24:01 20 Samsung's alleged copying.

02:24:03 21 With respect to Verizon's alleged copying, we
02:24:06 22 heard yesterday from Mr. Fenster that they are narrowing
02:24:11 23 and limiting that to one single instance, and that is the
02:24:14 24 allegation that Mr. -- I'm sorry, Russell, I couldn't
02:24:22 25 remember Mr. Russell's name -- that Mr. Russell said that

02:24:22 1 he saw someone take a PowerPoint presentation and pass it
02:24:31 2 off as Verizon's own. That's what Mr. Fenster said is
02:24:31 3 their Verizon copying allegation.

02:24:32 4 There is no testimony at all that anything in that
02:24:40 5 presentation meets the claims of the patent. There's no
02:24:42 6 connection whatsoever between that presentation and what's
02:24:45 7 in the patent.

02:24:45 8 So whether or not MIL 1 goes our way, at least
02:24:48 9 with respect to Verizon's copying, that -- that should not
02:24:52 10 be there.

02:24:53 11 And by the way, that is entirely premised on the
02:24:58 12 '042 patent. And for the '042 patent, we know that there's
02:25:00 13 no evidence of practicing the '042 patent because I asked
02:25:07 14 their expert, Dr. Cooklev: Do you have any opinion as to
02:25:11 15 whether or not the accused -- the ItsOn product practices
02:25:16 16 the '042 patent?

02:25:16 17 And he said unequivocally in his deposition: I
02:25:19 18 have no opinion. I have not done any analysis of that.

02:25:22 19 So that's an easy one.

02:25:23 20 So since the entire foundation of that alleged
02:25:29 21 Verizon copying is based on the '042 patent and the '042
02:25:33 22 patent alone, which -- and by the way, those activities
02:25:36 23 happened four years before the '042 patent even issued in
02:25:39 24 2010 -- April of 2010, because there's absolutely no
02:25:44 25 connection between what was allegedly copied and the '042

02:25:48 1 patent, there's not even a link between the '042 patent and
02:25:52 2 the ItsOn product, let alone that presentation, all of that
02:25:56 3 evidence should be excluded because it's irrelevant, and
02:25:59 4 because it's immensely prejudicial to hear an argument by
02:26:04 5 the other side that we copied something that has nothing to
02:26:07 6 do with the issues in this case is by its nature
02:26:14 7 inflammatory and prejudicial. And unless they can tie it
02:26:16 8 to something that's at issue in this case, which they
02:26:20 9 cannot, it should be excluded.

02:26:21 10 THE COURT: Is this an issue in a separately
02:26:23 11 pending motion?

02:26:24 12 MR. ROSENTHAL: It is a subsection of our MIL 2.
02:26:27 13 So if you look at our MIL 2 on Page 4, our MIL 2 is about
02:26:39 14 no argument or evidence that anyone copied ItsOn.

02:26:42 15 And then within that, we talk about evidence
02:26:45 16 related to Verizon's alleged copying and Samsung's. And if
02:26:49 17 you look at our reply, it's very laid out. I think we have
02:26:53 18 separate headings for it in our reply.

02:27:01 19 THE COURT: I'm confused. I thought we were
02:27:03 20 talking about your MIL 2 now.

02:27:05 21 MR. ROSENTHAL: We are, yes.

02:27:06 22 THE COURT: And I'm asking if your MIL 2 is also
02:27:11 23 in -- asserted in another pending motion? In other words,
02:27:16 24 is this a part of --

02:27:18 25 MR. ROSENTHAL: Oh.

02:27:20 1 THE COURT: -- this argument a part of some other
02:27:23 2 motion you've got?

02:27:23 3 MR. ROSENTHAL: I'm sorry, Your Honor. I
02:27:24 4 misunderstood the question.

02:27:26 5 We do have summary judgment motions on copying
02:27:28 6 allegations. So we have a summary judgment of no copying
02:27:30 7 that raises many of the same issues. Of course, in that
02:27:34 8 circumstance, the issues are whether or not there is
02:27:37 9 sufficient evidence to go to the jury on those questions.

02:27:39 10 This, of course, is from a different vantage
02:27:42 11 point. This is from the question of whether there is any
02:27:45 12 relevance to this evidence and whether or not there's
02:27:48 13 sufficient prejudice that outweighs that relevance. And so
02:27:52 14 this is from a different angle.

02:27:54 15 Of course, if the Court agrees with respect to the
02:27:58 16 copying allegations, that there's insufficient evidence to
02:28:01 17 go to the jury, then we don't have to get to this MIL.

02:28:04 18 I will say that when we moved for summary judgment
02:28:07 19 of no copying, Headwater didn't even point to these Verizon
02:28:11 20 allegations as evidence on which it would rely. So from
02:28:15 21 our understanding, they've abandoned that.

02:28:17 22 Now, we may hear differently, but that wasn't even
02:28:20 23 part of their defense to our summary judgment motion. So
02:28:20 24 when we talk about these two categories and we talk first
02:28:26 25 about the allegations that Verizon copied, they're not even

02:28:27 1 relying on those as a reason to go to the jury on the
02:28:31 2 question of copying. But that's a summary judgment issue.
02:28:36 3 Our argument here with respect to the MIL is that
02:28:39 4 there is no relevance to this because there's no connection
02:28:42 5 to the patent, and the prejudice far outweighs any
02:28:48 6 potential relevance.

02:28:48 7 THE COURT: If you lose the summary judgment
02:28:52 8 motion --

02:28:52 9 MR. ROSENTHAL: Yes.

02:28:53 10 THE COURT: -- and the decision is that there is
02:28:55 11 sufficient evidence to take it to a jury, how is this MIL
02:28:58 12 consistent with that?

02:28:59 13 MR. ROSENTHAL: Well, because there's still the
02:29:01 14 question of whether -- even if there is a tiny bit of
02:29:04 15 relevance, if they've been able to piece together because,
02:29:08 16 hey, it generally deals with ItsOn, even though it's not
02:29:11 17 specifically connected to the patent, and they can argue
02:29:13 18 sort of by the hair of the nose that they're able to get
02:29:17 19 something before the jury, there's still a question of
02:29:21 20 whether or not there is prejudice that outweighs that
02:29:24 21 relevance.

02:29:25 22 So we think that this implicates some of that.

02:29:28 23 I will say I think in assessing the summary
02:29:31 24 judgment motion, it is likely that the Court will assess
02:29:34 25 whether there is admissible evidence that they could

02:29:36 1 present, and if the Court finds that there is, it probably
02:29:39 2 is the case that we're going to lose this MIL, as well.
02:29:42 3 But I think legally, logically, there is a wide space
02:29:47 4 between the two.

02:29:48 5 THE COURT: It has to be admissible in order to
02:29:50 6 matter on summary judgment.

02:29:51 7 MR. ROSENTHAL: That's absolutely right, Your
02:29:53 8 Honor. And so if the Court considers the question of
02:29:55 9 prejudice with respect to the summary judgment motion and
02:29:58 10 considers all of that and determines that they have
02:30:01 11 competent evidence that is, in fact, connected to the
02:30:04 12 patent that is not outweighed by the prejudice and that's a
02:30:09 13 decision the Court makes in resolving the summary judgment
02:30:12 14 motion, then, of course, that resolves this issue, as well,
02:30:16 15 in the MIL.

02:30:16 16 THE COURT: All right. Well, I don't see any
02:30:17 17 benefit in assessing this evidence twice. So I think the
02:30:25 18 logical thing to do is to defer this MIL to consideration
02:30:29 19 with your motion for summary judgment and --

02:30:32 20 MR. ROSENTHAL: I'm sorry, Your Honor, I didn't
02:30:34 21 mean to interrupt.

02:30:35 22 THE COURT: Go ahead.

02:30:36 23 MR. ROSENTHAL: I'm so sorry.

02:30:38 24 I understand and agree with that, and the only
02:30:41 25 thing that I'll add is that with respect to the second

02:30:44 1 category of alleged copying, which is the Samsung issue,
02:30:48 2 there is a special prejudice involved there that even goes
02:30:52 3 beyond the Verizon allegations.

02:30:54 4 So we have the argument, of course, that if
02:30:57 5 Samsung copied the ItsOn product, and there's no evidence
02:31:00 6 that the ItsOn product meets the claims, then there's no
02:31:03 7 relevance. And we've made that argument in our summary
02:31:06 8 judgment motion, and we've made it here.

02:31:09 9 There is -- in that circumstance, there is an
02:31:12 10 extra prejudice even beyond the Verizon allegations. And
02:31:16 11 that extra prejudice is Samsung's not part of this case.
02:31:20 12 We will now have to be defending and explaining why
02:31:24 13 Samsung, a party not -- not here in this case, did or did
02:31:27 14 not copy. We don't have the benefit of having Samsung here
02:31:31 15 to defend itself.

02:31:32 16 And by the way, this Court excluded those
02:31:35 17 allegations in the actual Samsung case. So we are now
02:31:38 18 fighting a fight that didn't happen in the Samsung case.
02:31:41 19 And by the way, Samsung was actually found to not infringe
02:31:45 20 that patent in the first trial.

02:31:47 21 And so we're now forced to defend ourselves about
02:31:51 22 Samsung's alleged copying when Samsung was determined by a
02:31:55 23 jury to have not, in fact, copied. And that puts us in a
02:32:01 24 uniquely prejudicial situation. And it would require a
02:32:03 25 trial within a trial as to whether Samsung did, in fact,

02:32:06 1 copy the ItsOn product.

02:32:07 2 THE COURT: I don't know that the jury made a
02:32:10 3 decision about copying. They made a decision about
02:32:13 4 infringement.

02:32:13 5 MR. ROSENTHAL: Certainly that's true. And in
02:32:16 6 determining that the product that Samsung made and sold in
02:32:20 7 that case did not meet the elements, they certainly made
02:32:24 8 some conclusion about the comparison between what Samsung
02:32:28 9 did and what was in that patent.

02:32:29 10 Now, does that necessarily mean they rejected the
02:32:33 11 copying allegations? No. But it is probative of that
02:32:36 12 question.

02:32:36 13 THE COURT: I think the Court excluded the copying
02:32:42 14 allegation, if I'm remembering right.

02:32:44 15 MR. ROSENTHAL: That's true.

02:32:45 16 THE COURT: So I don't think that issue was
02:32:46 17 presented to the jury.

02:32:47 18 MR. ROSENTHAL: It was not, Your Honor. And I
02:32:48 19 guess that's my point is -- that's exactly right.

02:32:51 20 THE COURT: You just said the jury rejected it.

02:32:53 21 MR. ROSENTHAL: No, no. What I mean is there's
02:32:56 22 nothing that we can discern about whether the jury actually
02:33:03 23 assessed the copying question, per se, but what the jury
02:33:03 24 did do is determine that Samsung's products do not meet the
02:33:06 25 elements of the claims. How could Samsung have copied the

02:33:09 1 elements of the claims if they don't meet the elements of
02:33:11 2 the claims? That's the point.

02:33:13 3 And my point is if they are permitted to have a
02:33:17 4 trial within a trial in this case and to argue to the jury
02:33:21 5 that Samsung copied the patent, we will have to then say --
02:33:25 6 or at least we ought to be able to say -- we ought to be
02:33:31 7 able to say, well, a jury actually determined that the
02:33:33 8 product that you say is a copy does not actually meet the
02:33:35 9 claims.

02:33:36 10 Now, I don't think we're going to be allowed to
02:33:38 11 say that. I'm quite sure I'm not going to be allowed to
02:33:41 12 say that, but that's the prejudice of allowing this trial
02:33:44 13 within the trial.

02:33:45 14 The prejudice is we're now going to have a fight
02:33:48 15 in a case where there's a lot for the jury to actually look
02:33:51 16 at. We're going to have a fight about whether our products
02:33:54 17 infringe. And what they want to do is say, well, some
02:33:56 18 other company that's not here in this court copied the
02:34:00 19 ItsOn product.

02:34:02 20 And not only is there no evidence that the ItsOn
02:34:04 21 product relates to the patent claims, the evidence actually
02:34:07 22 suggests that Samsung didn't actually copy it. And that's
02:34:09 23 the point. That's what's so prejudicial about allowing
02:34:13 24 that copying allegation in, whether we win MIL 1 or not.

02:34:18 25 THE COURT: All right.

02:34:19 1 MR. ROSENTHAL: I fear from your expression that
02:34:21 2 I'm not making that point, but I don't know if there's any
02:34:25 3 questions that I can help answer.

02:34:27 4 THE COURT: I don't think so.

02:34:28 5 MR. ROSENTHAL: Okay.

02:34:29 6 THE COURT: I'm going to take up MIL 2 in
02:34:32 7 connection with the motion for summary judgment that you
02:34:35 8 have fully briefed.

02:34:37 9 MR. ROSENTHAL: That makes sense, Your Honor.

02:34:39 10 I'm happy to move to MIL 3.

02:34:41 11 THE COURT: All right.

02:34:41 12 MR. ROSENTHAL: So with respect to MIL 3, MIL 3 --
02:34:44 13 first of all, we have made some pleasant end roads to
02:34:49 14 MIL 3. The parties have agreed just this morning, and I
02:34:52 15 believe we have agreed language that we are either going
02:34:55 16 to -- we did, in fact, send to the Court that there is a
02:34:59 17 piece of MIL 3 that we have agreed to for the Verizon case.

02:35:03 18 MIL 3 is Verizon's motion to exclude evidence of
02:35:08 19 the communications and relationship between the company
02:35:11 20 ItsOn and Verizon.

02:35:14 21 One of the key pieces of evidence that they sought
02:35:16 22 to admit, until this morning, was that Verizon paid a bunch
02:35:20 23 of money to ItsOn and invested a lot of money in ItsOn.
02:35:25 24 They have now agreed that they are not going to present
02:35:27 25 that evidence, so that aspect of our MIL is now agreed.

02:35:34 1 What remains are the other aspects of the
02:35:39 2 Verizon/ItsOn relationship. So Verizon entered into an NDA
02:35:42 3 with ItsOn in 2010. They received samples. They
02:35:49 4 trialed -- they did some trialing of the software. They
02:35:52 5 paid money for that trial. Ultimately they didn't go
02:35:55 6 forward.

02:35:56 7 Now, what we have seen from many, many pages of
02:36:00 8 their expert reports is that they want to, from that,
02:36:03 9 create the impression that somehow Verizon looked at all of
02:36:09 10 this stuff, and we decided, oh, we don't need to pay for
02:36:12 11 all of this. We don't need to enter into this
02:36:15 12 relationship. We can do it all ourselves.

02:36:17 13 Now, there's all kinds of problems with that
02:36:19 14 theory, but that seems to be the theory that they're trying
02:36:22 15 to present. And the fact is that none of that has any
02:36:24 16 relevance to this case.

02:36:25 17 ItsOn, as we've already talked about, is a piece
02:36:28 18 of software for which there is no evidence, whether it
02:36:30 19 practices the claims of these patents. If there's no
02:36:33 20 evidence that the patent is practiced by this product, then
02:36:36 21 whether we contracted with them for the product, whether we
02:36:39 22 trialed the product, the results of those trials, all of
02:36:42 23 that stuff has nothing to do with the issues in this case.

02:36:45 24 There are two -- you know, they've already agreed
02:36:50 25 they're not going to put in the investments, but there are

02:36:53 1 two other aspects that are in particular prejudicial.

02:36:56 2 The first is the NDA. They want to enter into
02:37:00 3 evidence an NDA that Verizon and ItsOn got into. I don't
02:37:03 4 know what possible relevance that has to this case. The
02:37:06 5 only possible thing that we can think of is they want to
02:37:09 6 suggest to the jury that somehow that NDA was violated,
02:37:15 7 that somehow we did something improper with respect to that
02:37:17 8 NDA. And that's just not appropriate at all, and there's
02:37:21 9 no probative value of the NDA itself. It has nothing to do
02:37:24 10 with the issues in this case.

02:37:25 11 So at a minimum, that NDA should be excluded.

02:37:27 12 And the second specific example is the trials.
02:37:35 13 The fact that we received software from them, we tried it
02:37:38 14 on our phones in, I think, it was early 2011, there's
02:37:43 15 results of those trials, that has nothing to do with the
02:37:46 16 issues in this case, and it has nothing to do with it
02:37:49 17 because what we were trialing had nothing to do with these
02:37:54 18 patents.

02:37:54 19 What Sprint -- what Verizon was interested in was
02:38:00 20 something called a -- like a meter, a usage data meter for
02:38:04 21 how much usage you're using. How much data am I using at
02:38:05 22 this moment?

02:38:06 23 It had nothing to do with intercepting. It had
02:38:09 24 nothing to do with turning the Internet on and -- on for
02:38:12 25 background apps when they're not interfacing. It had

02:38:15 1 nothing to do with any of that. And there's no evidence at
02:38:17 2 all that anything that we were trialing met any of the
02:38:22 3 claims that are at issue in this case. And we've just
02:38:24 4 talked about that.

02:38:25 5 And so what they're trying to do is create the
02:38:28 6 impression that we looked at the patented technology, we
02:38:32 7 tried it, and then we went and infringed. And none of that
02:38:35 8 is true. But putting aside whether it's true, they have no
02:38:39 9 evidence connecting anything that we did to the actual
02:38:42 10 patents in this case.

02:38:43 11 And then the prejudice, once you -- once the jury
02:38:46 12 hears that we tried this software and decided not to go
02:38:49 13 forward -- we didn't actually decide not to go forward.
02:38:52 14 The company just went bankrupt. But once we -- once that
02:38:57 15 evidence -- once that suggestion gets before the jury,
02:39:02 16 there's no coming back from that. The jury is now infected
02:39:02 17 with that, and it really has nothing to do with the case.

02:39:07 18 So we believe the entire communication, the entire
02:39:09 19 relationship between Verizon and ItsOn should go -- we just
02:39:12 20 don't see how it's relevant at all. But at a minimum, in
02:39:16 21 addition to the investments, the NDA and the trials should
02:39:20 22 be excluded from evidence.

02:39:22 23 And I had only one more point that I wanted to
02:39:25 24 make, and that is with respect to the investments.
02:39:28 25 Curiously, the Plaintiff has agreed that they are not going

02:39:32 1 to introduce Verizon investments in the Verizon case, but
02:39:37 2 they maintain that they would like to talk about the
02:39:40 3 Verizon investments in the T-Mobile case.

02:39:41 4 Now, that's even more attenuated for the T-Mobile
02:39:45 5 case. The fact that Verizon invested money in ItsOn, in
02:39:50 6 the T-Mobile case, has nothing to do with the T-Mobile
02:39:52 7 case. And it's totally detached from the patents.

02:39:57 8 As the Court knows, ItsOn had 88 patents or
02:40:01 9 something like that at the time. And the Court has already
02:40:04 10 made rulings in this case and in the Samsung case that
02:40:08 11 investments in the company as a whole do not bear and are
02:40:11 12 not sufficiently connected to talk about what the value of
02:40:14 13 an individual patent is. And the same is true of the
02:40:18 14 investments with respect to ItsOn.

02:40:23 15 We do not think it's appropriate that they can
02:40:26 16 introduce evidence of Verizon's investments in the company
02:40:27 17 as a whole which creates this impression that somehow
02:40:31 18 Verizon valued the patented technology when there are
02:40:34 19 literally dozens and dozens and dozens of other things that
02:40:40 20 were -- that ItsOn had in addition to the particular
02:40:42 21 patents here.

02:40:43 22 So for the same reason that the Court found that
02:40:46 23 investments in ItsOn doesn't give any information about the
02:40:49 24 value of a patent, it also doesn't -- isn't relevant to the
02:40:53 25 value of the patent in this circumstance.

02:40:55 1 And so we would ask that the Court also rule that
02:40:58 2 that -- those investments should be excluded from the
02:41:00 3 T-Mobile case, as well.

02:41:01 4 THE COURT: All right.

02:41:03 5 MR. ROSENTHAL: Thank you, Your Honor.

02:41:04 6 THE COURT: Thank you.

02:41:17 7 MR. WIETHOLTER: Good afternoon, Your Honor.

02:41:18 8 Jason Wietholter for Headwater.

02:41:19 9 First of all, Your Honor, Verizon's position is
02:41:23 10 now a much, much narrower version of their title for this
02:41:27 11 MIL. Their title for this MIL is: No Argument or Evidence
02:41:31 12 Regarding Headwater or ItsOn's Pre-Suit Communications with
02:41:34 13 Verizon.

02:41:35 14 Based on Verizon's argument just now and
02:41:37 15 T-Mobile's argument just now, it's specific to ItsOn and
02:41:43 16 ItsOn's pre-suit communications with Verizon, not
02:41:47 17 Headwater.

02:41:48 18 And with respect to the two issues that are still
02:41:51 19 live in the Verizon case, the NDA and the trial, both of
02:41:56 20 these pieces of evidence are relevant to show a whole host
02:42:01 21 of different -- or support a whole host of different
02:42:03 22 arguments from Headwater and contentions from Headwater in
02:42:06 23 this case, including marking, damages, willfulness,
02:42:12 24 secondary considerations, and to rebut certain arguments
02:42:18 25 that -- that Verizon and T-Mobile are going to make, such

02:42:20 1 as the ItsOn software was -- had poor -- was buggy and was
02:42:30 2 insecure.

02:42:31 3 But all of this evidence about ItsOn's pre-suit
02:42:34 4 communications, the fact that Verizon knew of ItsOn, knew
02:42:36 5 of the technology, trialed the technology, paid for the
02:42:40 6 trial of the technology, all that evidence is relevant to
02:42:44 7 rebut those allegations about ItsOn's software and how --
02:42:48 8 how it actually operated.

02:42:50 9 And then separately, it's also affirmative
02:42:53 10 evidence for Headwater to show that Verizon was aware of
02:42:56 11 Headwater and ItsOn's technology, how it operated, that it
02:43:03 12 was -- that there were multiple patents that had been
02:43:05 13 applied for that were in the process of being issued, that
02:43:09 14 ItsOn's software was ultimately marked.

02:43:11 15 THE COURT: And what is the relationship between
02:43:15 16 those arguments that you want to make and the question
02:43:18 17 whether ItsOn practiced the asserted patent?

02:43:23 18 MR. WIETHOLTER: So, Your Honor, irrespective of
02:43:27 19 whether ItsOn practiced the asserted patents, the evidence
02:43:30 20 still is relevant to show what Headwater and ItsOn were
02:43:32 21 sharing with Verizon about Headwater's technology that
02:43:37 22 would issue in further patents.

02:43:39 23 So irrespective of whether ItsOn actually
02:43:42 24 practiced any of the patents, which seems to be the subject
02:43:45 25 and will be decided and probably rise and fall with the

1 other MILs and issues, what Headwater shared and what ItsOn
2 shared with Verizon about Headwater's technology that was
3 going to be implemented in ItsOn's functionality or that
4 was implemented in ItsOn's functionality is relevant to
5 show that Verizon, again, knew of Headwater and ItsOn, knew
6 that the patents -- knew about Headwater and its patents
7 and what it was planning to do with its patents and its
8 portfolio, and then also how all of that rebuts Defendants'
9 obviousness allegations, how all of that rebuts their
10 marking and failure to mark allegations.

11 In our -- in -- with respect to willfulness,
12 willfulness is also in our briefing on that issue, which I
13 believe is Docket 203, our opposition to their MSJ. The
14 Gustafson case specifically says that willfulness is based
15 on all of the circumstances or all the circumstances. It's
16 not a single specific fact that happens at one moment in
17 time, but rather it's all the facts and circumstances that
18 can give rise to willfulness or willful blindness.

19 If there is never -- if there isn't a patent
20 that's issued or if -- or if there isn't a patent
21 identified by number, the facts are still relevant to
22 willfulness and willful blindness.

23 So all of that is probative of the issues with --
24 that permeate this entire case on various different fronts,
25 irrespective of whether or not ItsOn itself actually

02:45:18 1 practiced those patents.

02:45:19 2 And Defendants really want to have it both ways,
02:45:23 3 and they want to argue that, you know, Headwater's patents
02:45:27 4 are obvious, but they don't want us to be able to talk
02:45:29 5 about evidence to rebut that based on Verizon's own
02:45:32 6 actions.

02:45:33 7 They want to argue we failed to mark, but they
02:45:38 8 don't want us to be able to talk about how ItsOn marked or
02:45:40 9 came to mark.

02:45:43 10 They want to talk about how -- or they want to
02:45:47 11 refute this allegation about willfulness, but they don't
02:45:49 12 want us to be able to talk about all the facts and
02:45:52 13 circumstances that lead to that.

02:45:54 14 So this MIL is really clearly about facts that are
02:45:57 15 relevant to a number of different issues here. And this
02:46:00 16 isn't a case where Headwater is asserting some fact from, I
02:46:07 17 don't know, like a market report or something that's not
02:46:09 18 tethered to the issues in this case. These are facts of
02:46:12 19 Verizon's own making. These are facts that shouldn't be
02:46:16 20 prejudicial to Verizon because Verizon or T-Mobile
02:46:19 21 themselves had interactions with Headwater and ItsOn.

02:46:23 22 And so whatever those facts show, those are -- to
02:46:26 23 the extent that they are prejudicial to Verizon and
02:46:28 24 T-Mobile, that prejudice is of their own making. It's not
02:46:33 25 something that Headwater has unduly created or that would

02:46:37 1 outweigh that relevance to all the various issues in the
02:46:40 2 case.

02:46:43 3 THE COURT: All right. Thank you, Mr. Wietholter.

02:46:47 4 MR. ROSENTHAL: Your Honor, I just have a few
02:46:49 5 brief responses.

02:46:50 6 The first that I'll raise is, you know, there's a
02:46:56 7 fundamental unfairness of them being able to tell the story
02:47:00 8 of the ItsOn relationship that they say is relevant to all
02:47:03 9 of these things. And that really goes back to what
02:47:05 10 Mr. Krevitt was arguing yesterday. You know, this is --
02:47:07 11 this is the problem. The problem is they want to tell this
02:47:09 12 story about alleged willfulness and communications and
02:47:13 13 trials and all that stuff, but there's a vast trove of
02:47:17 14 documents that no longer exist that we don't have to fight
02:47:21 15 back and to actually explain what the product really was.

02:47:24 16 So that's -- that's a -- I just don't want to lose
02:47:28 17 sight of that's what we're talking about. That's the
02:47:31 18 prejudice that Mr. Krevitt was talking about yesterday.

02:47:33 19 Second, counsel went on at length for all the
02:47:37 20 reasons that he thinks that this whole story is important,
02:47:40 21 that we trialed the technology, that we knew of the
02:47:43 22 technology, that we paid for the technology.

02:47:48 23 What is "the" technology? This is only
02:47:50 24 relevant -- it's only relevant if there's some connection
02:47:54 25 between that technology and these patents, and that's

02:47:57 1 MIL 1. There is none. And so I don't think they have an
02:48:01 2 argument. I really don't. If we win MIL 1, MIL 3 should
02:48:05 3 be -- should follow like a domino.

02:48:08 4 Now, even if we lose MIL 1, nonetheless we already
02:48:12 5 know that there's a huge amount of stuff in this
02:48:15 6 relationship and a huge amount of stuff in these products
02:48:18 7 that are unrelated to the patents. We know that because
02:48:21 8 they say they practice, you know, 88 different patents in
02:48:24 9 these -- in these products.

02:48:27 10 And so we know that there's no -- no sufficient
02:48:30 11 connection that we can draw any inference about the value
02:48:33 12 of this technology merely from the fact that Verizon
02:48:36 13 decided to trial an ItsOn product that may or may not have
02:48:41 14 practiced this particular patent but certainly has tons of
02:48:43 15 other things in it. And that really is the decision that
02:48:47 16 the Court has already made with respect to valuations.
02:48:50 17 It's the same analysis. The fact that somebody has looked
02:48:53 18 at a product or learned information, unless you tie it
02:48:56 19 somehow to the patent, that's -- that's insufficient.

02:48:58 20 So from our perspective, whether -- if we win
02:49:05 21 MIL 1 -- in other words, if they can't establish through
02:49:07 22 some evidence that this product or these products that
02:49:11 23 ItsOn had had any connection at all to these patents, then
02:49:15 24 all of the relationship and discussion about them should go
02:49:19 25 out the door.

02:49:20 1 But even if we lose MIL 1, there's independent
02:49:24 2 prejudicial reasons and lack of relevance reasons to
02:49:26 3 exclude this evidence.

02:49:26 4 I do want to raise just two additional points.
02:49:29 5 The first is I didn't hear anything about the NDA. I
02:49:32 6 didn't hear anything about why the NDA is relevant, and the
02:49:36 7 reason is it's not. And it really has nothing to do with
02:49:39 8 this case. That should be an easy first step in this
02:49:43 9 particular MIL.

02:49:44 10 And with respect to the trials, I didn't hear
02:49:46 11 anything about why the trials in particular bear at all on
02:49:50 12 the value here, the fact that we trialed this -- this
02:49:54 13 software. Even if it practiced the claims, the fact of the
02:49:57 14 trials -- I mean, they've already agreed that they're not
02:50:00 15 going to talk about the payments for the trials, so why are
02:50:03 16 we talking about the trials themselves? It has the same
02:50:06 17 prejudicial effect.

02:50:06 18 So at a minimum, those should be excluded.

02:50:09 19 THE COURT: You're saying even if it -- even if
02:50:11 20 the trials practiced the claims, you would say it's
02:50:15 21 irrelevant?

02:50:16 22 MR. ROSENTHAL: Yes, Your Honor. It has marginal
02:50:18 23 relevance. I'm not sure what the fact that we trialed a
02:50:18 24 product, what -- the fact that Verizon -- let's assume for
02:50:22 25 a moment that they had evidence that it actually practiced

02:50:25 1 the patents, which by the way didn't issue. The patents
02:50:28 2 didn't issue until years later. So none of the patents had
02:50:31 3 actually issued at this time.

02:50:33 4 All right. The trial happened in 2011. The first
02:50:36 5 of the patents issued in 2013. So at that time, for the
02:50:43 6 product that was being trialed, let's say it did have the
02:50:45 7 elements of the claims, the fact that we looked at that
02:50:50 8 product and tried it out, what does that go to? It doesn't
02:50:53 9 go to anything.

02:50:57 10 THE COURT: You're saying there was no application
02:50:59 11 pending at the time?

02:51:00 12 MR. ROSENTHAL: There were applications -- there
02:51:00 13 was a parent application for one of the patents -- or for
02:51:02 14 some of the patents, I should say. The priority date is
02:51:04 15 earlier. I think of the three patents, two of the actual
02:51:07 16 applications hadn't even been filed yet.

02:51:12 17 So at the time that these trials were happening,
02:51:14 18 it's not like it could probably be evidence of willfulness
02:51:18 19 because the patents didn't exist at that time.

02:51:19 20 So this argument that somehow this is evidence of
02:51:21 21 willfulness, they never told us anything about these
02:51:23 22 particular patents. They never said, you know, that
02:51:27 23 there's -- these features that we're talking about here are
02:51:29 24 going to be patented. They did, of course, say generally
02:51:33 25 our products are covered by patents, but as the Court

02:51:35 1 knows, that's not sufficient for willfulness.

02:51:37 2 What they want to do is they want to blur the
02:51:39 3 lines. What they want to do is say, hey, you all trialed
02:51:43 4 the product, and it's called ItsOn, and ItsOn licensed
02:51:46 5 patents from Headwater. Therefore, these particular claims
02:51:48 6 of these patents were copied. That's what they're trying
02:51:52 7 to do.

02:51:53 8 And it's exactly that broad-brush approach that we
02:51:56 9 think requires the Court to step in and exercise its
02:52:00 10 gatekeeper role to say there's not a sufficient connection
02:52:03 11 to these patents in this case to justify the prejudice that
02:52:09 12 comes from telling that story. There's just not a
02:52:12 13 sufficient connection. And that's our point, especially,
02:52:16 14 Your Honor, with respect to those two pieces of evidence.
02:52:18 15 We think with respect to the whole relationship, as well.

02:52:21 16 And the last point I want to make is I didn't hear
02:52:24 17 any response at all to why the investments that Verizon
02:52:29 18 made has any relevance whatsoever to the T-Mobile case.
02:52:33 19 So, again, at a minimum, that should be excluded, as well.

02:52:36 20 THE COURT: All right.

02:52:39 21 MR. ROSENTHAL: Thank you, Your Honor.

02:52:39 22 THE COURT: Thank you, Mr. Rosenthal.

02:52:43 23 As far as the T-Mobile issue goes, I'll circle
02:52:47 24 back to that when we take up that case separately.

02:52:53 25 MR. WIETHOLTER: Thank you, Your Honor.

02:52:54 1 THE COURT: I understand there'll be other
02:52:56 2 arguments then.

02:52:56 3 But I'm going to decide the first motion in limine
02:53:06 4 for Defendants before reaching this one.

02:53:15 5 So we can move on to --

02:53:17 6 MR. WIETHOLTER: Your Honor?

02:53:18 7 THE COURT: Yes.

02:53:19 8 MR. WIETHOLTER: Your Honor, if I may, a couple of
02:53:20 9 points of clarification on this MIL No. 3.

02:53:23 10 THE COURT: All right.

02:53:25 11 MR. WIETHOLTER: As we've already discussed at
02:53:27 12 length, we do have sufficient facts, evidence, and opinions
02:53:33 13 in this case from both of our experts on invalidity issues,
02:53:39 14 Erik de la Iglesia and Mr. Cooklev, on nexus and secondary
02:53:46 15 considerations that apply, even setting aside the issues
02:53:52 16 from MIL No. 1 -- Defendants' MIL No. 1.

02:53:57 17 And as we state in our briefing, as to the value
02:54:02 18 of the trials and the value of the work that was done with
02:54:10 19 Verizon, including the investments which I'll address in
02:54:13 20 more detail later, the amount of that value isn't necessary
02:54:16 21 to show any of the facts that we're contending are relevant
02:54:20 22 here. The very fact that Verizon was interested in
02:54:25 23 Headwater's patented technology in ItsOn is evidence to
02:54:30 24 support secondary considerations and to rebut certain of
02:54:35 25 their allegations that they're making in this case about

02:54:38 1 ItsOn.

02:54:38 2 So even if the value -- the amount of that value
02:54:43 3 is out, is irrelevant, the fact that they hired the
02:54:48 4 companies involved in this case to implement the technology
02:54:52 5 is relevant to the issues.

02:54:53 6 And the NDA -- I think maybe I didn't say it as
02:54:58 7 artfully or as clearly as I wanted to, but the NDA is
02:55:02 8 relevant to show when Verizon was aware of Headwater and
02:55:05 9 ItsOn and when they began to work with them and that the
02:55:08 10 technology was important such that it was covered by an NDA
02:55:12 11 to protect that confidential technical information.

02:55:22 12 And in particular, the de la Iglesia paragraph,
02:55:27 13 just so we're clear in the record -- and this is in Docket
02:55:30 14 184-2, Paragraphs 421 through '77, and Mr. Cooklev's
02:55:37 15 report -- I apologize, I don't have the docket number
02:55:40 16 handy. I will get that for the Court -- those are
02:55:42 17 Paragraphs 90 to 99.

02:55:44 18 And, finally, Your Honor, there -- the Avia Group
02:55:50 19 International, Inc. vs. L.A. Gear California case, this is
02:55:55 20 853 F.2d 1557, and this is at 1566. This case -- this case
02:56:12 21 shows that even -- that willfulness -- willfulness can
02:56:16 22 result even if knowledge of -- even if there's knowledge of
02:56:21 23 a patent application that later leads to a patented
02:56:24 24 invention, that the Defendant ultimately infringes knowing
02:56:29 25 of the application and the later -- and the later

02:56:36 1 infringement by using that technology.

02:56:40 2 So even if the patents did issue after the time
02:56:44 3 period in which Verizon entered into an NDA with ItsOn and
02:56:51 4 learned of Headwater and even if the patents issued after
02:56:54 5 the trials were over, that doesn't defeat the willfulness
02:57:01 6 claim. That's merely one cog, if you will, in the totality
02:57:05 7 of the circumstances that should be weighed in the
02:57:08 8 willfulness determination.

02:57:09 9 And, Your Honor, Cooklev -- the Cooklev report is
02:57:13 10 at Docket 185-3.

02:57:20 11 THE COURT: All right.

02:57:21 12 MR. WIETHOLTER: Thank you, Your Honor.

02:57:21 13 THE COURT: Thank you, Mr. Wietholter.

02:57:22 14 MR. ROSENTHAL: Okay. Your Honor, I'd like to
02:57:24 15 move to Defendants' MIL No. 4, and this has to do, I will
02:57:31 16 say, with something that is very narrow. This is a
02:57:35 17 gentleman by the name of Thomas Russell who was an employee
02:57:39 18 of Verizon who had dealings with ItsOn in 2010 and 2011.
02:57:46 19 And he filed at some point a whistleblower lawsuit in which
02:57:52 20 he alleged that there was some copying by Verizon of
02:57:55 21 certain things of ItsOn.

02:57:58 22 And he filed the lawsuit because in his view there
02:58:00 23 was retaliation against him, and he believes he was forced
02:58:03 24 out into a lesser role in the company.

02:58:05 25 So we don't think any of this story has any place

02:58:09 1 in this trial. This is -- this is truly a trial within a
02:58:12 2 trial. Thankfully, last night and this morning, Headwater
02:58:16 3 has now backed off of much of this. They have now agreed
02:58:20 4 that they will not introduce evidence of the lawsuit, so
02:58:24 5 the actual whistleblower complaint. They will not
02:58:27 6 introduce evidence of any retaliation that was alleged to
02:58:31 7 have occurred. And they will not make any reference to
02:58:36 8 so-called reverse engineering.

02:58:38 9 Mr. Russell referred to reverse engineering, but
02:58:43 10 he explained very clearly in his deposition he didn't mean
02:58:46 11 reverse engineering, he meant there was a PowerPoint
02:58:50 12 presentation and he saw similar slides in a Verizon
02:58:52 13 presentation, and he thought that they hadn't properly
02:58:55 14 given credit to ItsOn for those slides. That's what this
02:59:00 15 whole thing is about is a slideshow that he thought was
02:59:03 16 replicated within Verizon.

02:59:04 17 So those three aspects have -- are now off the
02:59:07 18 table. And what is left is our fundamental problem with
02:59:15 19 Mr. Russell testifying that he believes that Verizon copied
02:59:18 20 things from ItsOn, when the things that he alleged to have
02:59:22 21 been copied in 2010 are a PowerPoint presentation that has
02:59:28 22 absolutely no connection to the patent in this case or to
02:59:31 23 the patents in this case.

02:59:32 24 So let me start with one important thing. One of
02:59:36 25 the things that Headwater keeps saying with respect to all

02:59:41 1 of this ItsOn-Verizon relationship is, well, there was a
02:59:46 2 patent marking page. I want to make one fact very clear.
02:59:49 3 There was no patent marking page in 2011. That did not
02:59:55 4 exist in 2011.

02:59:56 5 So any notion that somehow these interactions are
03:00:00 6 relevant because there was a patent marking page, which by
03:00:00 7 the way didn't list any of these patents because the
03:00:03 8 patents didn't exist, but in any event, they said, well,
03:00:06 9 what if you knew about the applications? There was no
03:00:09 10 marking page. So that's just a red herring.

03:00:12 11 Now, what we argued in our brief is that
03:00:19 12 Mr. Russell's allegations of copying have no connection to
03:00:23 13 this case. And what Headwater said in response has nothing
03:00:26 14 to do with what we argued. Headwater has a page in their
03:00:29 15 brief of bulleted excerpts from Mr. Russel's testimony
03:00:34 16 where Mr. Russell says, well, there were lots of
03:00:37 17 conversations with ItsOn, where he says, we understood that
03:00:40 18 ItsOn had a lot of patents, we understand that if anybody
03:00:43 19 were to use this, we'd have an intellectual property
03:00:47 20 problem. None of that is what our MIL is about.

03:00:50 21 We have problems with that testimony
03:00:52 22 independently. We'll raise that on deposition designation
03:00:54 23 day. But none of that is what we're complaining about.
03:00:59 24 What we're complaining about and what they haven't agreed
03:01:01 25 to withdraw is the allegations that Mr. Russell makes about

03:01:05 1 this copying.

03:01:07 2 Now, this is something that was settled by
03:01:11 3 Mr. Russell out of court. They agreed to waive any claims
03:01:15 4 that anything had gone wrong. Nobody admitted any
03:01:18 5 liability for anything. There was a payment made, and the
03:01:22 6 case was settled. And for us to now have a mini trial
03:01:24 7 about whether or not this copying occurred would require
03:01:27 8 some connection to the issues in this case.

03:01:28 9 Now, there is zero testimony in this case, zero
03:01:34 10 testimony that what's in that April 2010 PowerPoint has
03:01:40 11 anything to do with the '042 patent. That's the only
03:01:45 12 patent that they say that the ItsOn product practiced at
03:01:50 13 that time was the '042 patent. They have made no
03:01:51 14 connection.

03:01:52 15 First of all, their expert, Dr. Cooklev, I asked
03:01:55 16 if he has an opinion even about the ItsOn product.

03:01:58 17 And he said: I have no opinion. I've done no
03:01:58 18 analysis about whether the ItsOn product practices.

03:02:04 19 We've talked about that.

03:02:04 20 But it's even worse for the PowerPoint because the
03:02:07 21 PowerPoint has to do with all kinds of things. And the
03:02:09 22 question is, is there anything in that PowerPoint
03:02:12 23 presentation that embodies or captures what's written down
03:02:15 24 in the '042 patent? And -- and there's been no evidence in
03:02:18 25 this case that there is.

03:02:19 1 So this is just a salacious sort of sexy story
03:02:22 2 that they want to tell, and they're desperate to keep some
03:02:26 3 little part of it, but it just doesn't have anything to do
03:02:29 4 with the case.

03:02:30 5 I don't have to say much about prejudice, I don't
03:02:33 6 think. I can't imagine something more prejudicial than an
03:02:36 7 insider saying, oh, I saw them copy something, which is, of
03:02:40 8 course, why they want it to be in front of the jury. But
03:02:42 9 unless that's something that was copied is the claims or
03:02:45 10 something to do with the claims and unless there's evidence
03:02:48 11 that it is, which there is not, that's all it is, is a
03:02:51 12 salacious allegation that they're going to use to taint the
03:02:54 13 jury.

03:02:57 14 So we don't believe that there's any showing at
03:02:59 15 all that this is relevant to anything.

03:03:01 16 The only other thing I'll say is in their
03:03:04 17 opposition, they point to patent briefs where they say
03:03:08 18 Headwater disclosed to Verizon these things called patent
03:03:11 19 briefs that describe their patent portfolio. That's not
03:03:14 20 the subject of our MIL. We have independent objections to
03:03:17 21 those documents. We'll take that up at the time that we
03:03:21 22 talk about objections to documents. That's not copying
03:03:24 23 allegations.

03:03:25 24 Our MIL is about Mr. Russell's allegations that
03:03:28 25 something was taken, and that's all this MIL is about.

03:03:32 1 Thank you, Your Honor.

03:03:33 2 THE COURT: All right.

03:03:37 3 MR. CHANG: May I approach?

03:04:04 4 THE COURT: Yes.

03:05:00 5 MR. CHANG: Good afternoon, Your Honor. Dale

03:05:01 6 Chang for Plaintiff, Headwater.

03:05:05 7 Let me just try to get my slides up here.

03:05:08 8 Okay. All right. So Mr. Rosenthal said that the
03:05:34 9 ItsOn presentation that Mr. Russell testified about is
03:05:39 10 irrelevant to any of the patents in the case. That's just
03:05:43 11 not true.

03:05:43 12 So as we'll see throughout this presentation, we
03:05:50 13 have technical disclosures that ItsOn made to -- provided
03:05:55 14 to Verizon under that NDA that directly relate to some of
03:06:04 15 the core features of the patented technology.

03:06:08 16 Now, for example, on Slide 1, which is the slide
03:06:12 17 that ends in 986, we talk about controlling at a device
03:06:19 18 level on a per-application basis network traffic. That's
03:06:24 19 something that hadn't been done before, and Mr. Russell
03:06:28 20 testified that Verizon itself thought that this was a
03:06:32 21 game-changing solution to the problems that it was facing.

03:06:34 22 On the next slide, we see -- and this is in the
03:06:40 23 slide deck -- that April 2010 presentation, the page ending
03:06:45 24 in 992, a description of network traffic characterization
03:06:51 25 accomplished on the devices. Before it was accomplished in

03:06:55 1 the network, and that had also sorts of problems. ItsOn's
03:06:58 2 solution was game-changing in that they moved that
03:07:01 3 functionality to the device, and they disclosed information
03:07:05 4 describing how they would do that to Verizon.

03:07:09 5 Millions of devices individually control traffic.
03:07:13 6 Each device has perfect visibility. So it's talking about
03:07:17 7 the benefits, the solution, and some of the ways that these
03:07:22 8 things would be accomplished.

03:07:23 9 Next slide, again, conserves network capacity.
03:07:29 10 Controls device network access behavior at the source,
03:07:33 11 meaning at the device. Example, background OS maintenance
03:07:35 12 and software update access. Background traffic control.

03:07:42 13 We have another example on the slide ending in
03:07:46 14 998. Example activities that cause difficulties for
03:07:53 15 carriers like Verizon. Background OS accesses and
03:07:56 16 information exchanges, constant and inefficient small and
03:08:01 17 large socket open/close events, software updates,
03:08:06 18 application background OS accesses, content subscription
03:08:06 19 service background updates, and it goes on.

03:08:11 20 And then near the bottom it says: The ItsOn
03:08:13 21 solution meets these -- the needs of the carrier because it
03:08:17 22 can control these background accesses. It can throttle
03:08:21 23 background accesses at the device. And this was --
03:08:27 24 and Mr. -- according to Mr. Russell, received by Verizon as
03:08:34 25 groundbreaking, revolutionary, something that hadn't been

03:08:38 1 thought of before.

03:08:39 2 THE COURT: And, Mr. Chang --

03:08:43 3 MR. CHANG: Yes.

03:08:43 4 THE COURT: -- has one of your experts opined that
03:08:46 5 any of these slide materials are related to the claims of
03:08:53 6 the asserted patents?

03:08:55 7 MR. CHANG: Well, yes. I mean -- so what they do
03:09:00 8 is both Dr. Cooklev and Dr. Wesel, they walk through the
03:09:07 9 evidence, including this presentation, to show that
03:09:13 10 Verizon, after receiving this information, shortly
03:09:16 11 thereafter came up with this PCO technology that was
03:09:24 12 suspiciously similar to the information that ItsOn
03:09:29 13 disclosed. And that is the infringing -- accused
03:09:33 14 infringing technology for the '042 patent, as well as the
03:09:39 15 '541 patent and a dependent claim of the '613 patent.

03:09:42 16 THE COURT: And you may be answering my question,
03:09:46 17 but my question is just whether your experts have said
03:09:51 18 these materials are related to the asserted patents, and --

03:09:57 19 MR. CHANG: Yes.

03:09:59 20 THE COURT: -- that's all the relevance I would
03:10:02 21 need. And I'm trying to figure out if I have to arrive at
03:10:04 22 that opinion myself, based on what you're telling me, or if
03:10:07 23 you have an expert opinion in this case that says that.

03:10:12 24 MR. CHANG: Yes, we do. And as one example,
03:10:15 25 Docket 185-3, the Cooklev report, if you look at

03:10:19 1 Paragraphs 90 to I think around 110, 116, you will see a
03:10:27 2 lengthy discussion there of the patented features and how
03:10:36 3 Verizon had touted or praised these features. And then
03:10:41 4 ultimately how the evidence indicates that Verizon copied
03:10:46 5 the ItsOn information and ended up infringing the asserted
03:10:52 6 patents.

03:10:53 7 THE COURT: And what you're showing there now is
03:10:57 8 part of what Mr. Russell says that he saw Verizon
03:11:05 9 discussing back in 2010 or '11?

03:11:14 10 MR. CHANG: Correct.

03:11:14 11 THE COURT: Okay.

03:11:14 12 MR. CHANG: He testifies about that presentation.
03:11:19 13 And if you look at Slide -- yeah, so Slide 7 of my
03:11:31 14 presentation, you'll see -- now, a few months after this
03:11:37 15 April 2010 presentation, that's the presentation we were
03:11:40 16 just looking at, did you learn of troubling conduct by
03:11:43 17 Verizon's employees?

03:11:44 18 Yes. Well, I saw them put some of this
03:11:47 19 information in Verizon's internal presentation and present
03:11:51 20 it as their own.

03:11:52 21 THE COURT: All right. And what you pointed me to
03:12:10 22 in -- is it Dr. Cooklev?

03:12:13 23 MR. CHANG: Yes.

03:12:13 24 THE COURT: And what was the docket number on
03:12:16 25 that?

03:12:18 1 MR. CHANG: 185-3.

03:12:28 2 THE COURT: All right. All right. Thank you,
03:12:29 3 Mr. Chang. I think that's all I really need to hear from
03:12:32 4 the Plaintiff on this.

03:12:33 5 MR. CHANG: Thank you, Your Honor.

03:12:34 6 MR. ROSENTHAL: Your Honor, can I go right to that
03:12:36 7 point?

03:12:36 8 THE COURT: You can.

03:12:37 9 MR. ROSENTHAL: You asked a question that I
03:12:40 10 thought was very direct, which is does any Headwater expert
03:12:45 11 look at this PowerPoint presentation and connect it in any
03:12:48 12 way to the claims? And Mr. Chang said yes. And he pointed
03:12:53 13 you to Paragraphs 90 to 110 of Dr. Cooklev's declaration.
03:12:59 14 I have those paragraphs here, and I've just read them
03:13:01 15 again. And not a single one of those paragraphs does
03:13:01 16 anything of the kind.

03:13:04 17 What Paragraphs 90 through 110 do is they -- in
03:13:09 18 fact, we have a Daubert motion on this because they
03:13:11 19 literally have no analysis. This is a section that is
03:13:18 20 entirely factual, no opinions whatsoever. This is a
03:13:21 21 section where Dr. Cooklev goes for 20 paragraphs and sets
03:13:26 22 forth their opening statement.

03:13:29 23 They say -- he says here's some facts. There is
03:13:33 24 an NDA. They entered into an NDA. They received
03:13:38 25 information. That information included information about

03:13:40 1 the ItsOn product. The ItsOn product was described in
03:13:43 2 these details. They took that information. They did
03:13:46 3 something with it.

03:13:47 4 At no time does he ever connect this to the claims
03:13:50 5 because it has nothing to do with the claim.

03:13:52 6 Now, I heard Dr. -- Dr. Chang, sorry, sounded like
03:13:55 7 expert testimony. I heard Mr. Chang say about the document
03:14:01 8 that he believes that it is connected to the claims. But
03:14:03 9 if you look at these paragraphs -- so Paragraph 90 just
03:14:08 10 sets it up. It's just throat clearing.

03:14:12 11 THE COURT: Mr. Rosenthal, given that we're
03:14:14 12 running out of time, let me just ask -- Mr. Chang, would
03:14:18 13 you show me where in the paragraphs you think that there's
03:14:23 14 something that connects in some way this presentation to
03:14:30 15 the asserted patent?

03:14:49 16 MR. CHANG: I'm having trouble --

03:15:25 17 THE COURT: I tell you what, we're really overdue
03:15:29 18 for the afternoon recess. While you're trying to locate
03:15:33 19 that --

03:15:35 20 MR. CHANG: I've got it up actually.

03:15:38 21 THE COURT: -- we'll go ahead and take the
03:15:41 22 afternoon recess and then come back and pick up right
03:15:43 23 there.

03:15:44 24 Thank you.

03:15:44 25 COURT SECURITY OFFICER: All rise.

03:15:45 1 (Recess.)

03:15:45 2 COURT SECURITY OFFICER: All rise.

03:35:00 3 THE COURT: Thank you. Please be seated.

03:35:01 4 Whenever you're ready, Mr. Chang.

03:35:04 5 MR. CHANG: Thank you, Your Honor.

03:35:05 6 So I have up on the screen Dr. Cooklev's opening

03:35:12 7 report, again, Document No. 185-3. We're looking at

03:35:17 8 Paragraph 90, and this is the very first paragraph of that

03:35:20 9 entire section in which he talks about that very

03:35:23 10 presentation, and he says: Based on my experience in the

03:35:27 11 telecommunications industry, the extensive interactions

03:35:31 12 Verizon had with Headwater and ItsOn, and the timeline of

03:35:35 13 events discussed below, it is my opinion that Verizon would

03:35:38 14 have been aware of or at least willfully blinded itself to

03:35:43 15 the '042 patent.

03:35:43 16 And going on to Paragraph 101, he discusses

03:35:49 17 specifically the April 2010 presentation.

03:35:51 18 102: By May 2011, ItsOn had developed a

03:35:57 19 Verizon-specific DAS platform and conducted field trials to

03:36:01 20 evaluate the platform's effectiveness, including features

03:36:04 21 protected by the '042 patent.

03:36:05 22 And then he talks about -- you know, to address

03:36:11 23 the issues, Verizon proposed the DAS system remarkably

03:36:17 24 similar to the one that Verizon had trialed just months

03:36:20 25 before, including by extending service usage controls to

03:36:24 1 the user -- UE, which is the end-user device, and provide
03:36:28 2 customized device behaviors, such as having the UE block
03:36:30 3 background data traffic while allowing foreground data
03:36:32 4 traffic.

03:36:32 5 And then going down to the end, as another
03:36:39 6 example, he says: It is my opinion that based on the facts
03:36:42 7 above, including the technical documents, et cetera, a
03:36:45 8 POSITA would conclude that Verizon understood that there
03:36:48 9 was a high probability that its device assisted services
03:36:52 10 system infringes one or more Headwater patents and that
03:36:55 11 Verizon deliberately avoided learning of that fact, which
03:36:59 12 is further underscored by Mr. Russell's testimony.

03:37:02 13 So I submit that there are clear linkages between
03:37:07 14 not only the April 2010 presentation but other information
03:37:10 15 that was provided to Verizon under the NDA which Verizon
03:37:15 16 then took, put in its own presentations, and then
03:37:18 17 ultimately adopted in its network.

03:37:22 18 THE COURT: All right. Thank you, Mr. Chang.

03:37:25 19 MR. CHANG: Thank you, Your Honor.

03:37:28 20 Oh, and sorry, I forgot to mention one other
03:37:33 21 thing. Just to make the record clear, I wanted to mention
03:37:36 22 that Dr. Wesel also has a similar discussion in his report,
03:37:44 23 Appendix A for Verizon, his opening report with respect to
03:37:49 24 the '541 and '613 patents. And that would be Docket 182-6.

03:38:06 25 Thank you, Your Honor.

03:38:07 1 THE COURT: All right.

03:38:07 2 MR. ROSENTHAL: Your Honor, if I can briefly
03:38:12 3 respond to that?

03:38:17 4 THE COURT: All right.

03:38:18 5 MR. ROSENTHAL: The question that this MIL
03:38:20 6 presents is whether Mr. Russell can make an allegation or
03:38:26 7 recount his allegation or his belief that Verizon copied an
03:38:32 8 April 2010 presentation. That is the extent of his
03:38:36 9 allegation. That is it. And you heard Mr. Fenster
03:38:40 10 yesterday say that is it, that is all we're alleging with
03:38:42 11 respect to Verizon's copying. That's it. Nothing about
03:38:46 12 the trials. Nothing about anything else.

03:38:47 13 And so Your Honor asked a very simple question:
03:38:50 14 Did any expert link that presentation or anything in that
03:38:53 15 presentation to the '042 patent?

03:38:57 16 And I just saw four paragraphs that Mr. Chang put
03:39:00 17 on the screen. Not a single one of them did so. Paragraph
03:39:04 18 90 doesn't mention the presentation at all. He's talking
03:39:08 19 about knowledge in 2016, five years later, and he doesn't
03:39:10 20 cite that presentation, and nowhere does he say here's
03:39:15 21 where it links up to the '042.

03:39:17 22 Paragraph 101 has to do with the presentation, but
03:39:20 23 it doesn't link it in any way or discuss the '042.

03:39:24 24 Paragraph 102 has to do with the field trials. It
03:39:27 25 had nothing to do with the presentation.

03:39:29 1 And then Paragraph 116 is a conclusion where he
03:39:33 2 doesn't even link it to the '042. He says: I think that
03:39:36 3 there was willful infringement of one or more Headwater
03:39:37 4 patents.

03:39:38 5 Now, if there were any doubt as to whether
03:39:42 6 Dr. Cooklev actually did this analysis, I asked him in his
03:39:48 7 deposition whether he did it. I asked him for -- may I
03:39:52 8 please have the ELMO? Thank you.

03:39:54 9 I asked him for a couple pages because he was sort
03:39:57 10 of being a little bit coy about what I was talking about.
03:40:00 11 But in his deposition, starting at Page 36, I asked him
03:40:05 12 over and over again whether he did any analysis about
03:40:10 13 whether or not the ItsOn proposals or products or software
03:40:15 14 practiced at all the '042 patent. I mean, he didn't even
03:40:20 15 understand what I was talking about. He said: I don't
03:40:22 16 know what you mean by ItsOn.

03:40:24 17 I mean, he didn't remember having written these
03:40:25 18 paragraphs.

03:40:26 19 And I said -- so this is now on Page 37 at 18:
03:40:30 20 Have you performed any analysis as to whether ItsOn
03:40:33 21 practiced?

03:40:36 22 As I stated, ItsOn invented that. Beyond that, I
03:40:39 23 did not analyze whether ItsOn's proposals or offerings
03:40:44 24 practiced the claims.

03:40:45 25 I asked him again: Do you have any opinions as to

03:40:48 1 whether any of the products that they offered or sold?

03:40:50 2 And he said: I don't have anywhere in my report
03:40:52 3 memorized. If somewhere I refer to ItsOn products, point
03:40:55 4 me to it. I'll be happy to answer. But subject to that, I
03:40:56 5 didn't think investigating ItsOn's products is at all
03:40:59 6 necessary for my opinions.

03:41:00 7 And then the ultimate question on Page 39, Line
03:41:05 8 14: Do you have an opinion as to whether any of these
03:41:08 9 practice?

03:41:09 10 I think we went over it. I don't clearly even
03:41:12 11 recall what products we're talking about. I don't recall
03:41:14 12 and I don't think I've ever provided opinions on that, so I
03:41:17 13 did not investigate that.

03:41:18 14 They are now trying to tell you that Dr. Cooklev
03:41:23 15 did some kind of an analysis to link this presentation
03:41:26 16 about ItsOn's products to the '042 when the man said he
03:41:28 17 didn't even do that analysis. And it's not in his report.

03:41:31 18 And so what we have here is a salacious allegation
03:41:35 19 of copying that stands alone that has nothing to do with
03:41:39 20 the '042 patent that Mr. Chang wants to do an analysis
03:41:43 21 himself and explain why he thinks it's relevant to the '042
03:41:46 22 patent. Totally inappropriate.

03:41:47 23 The other thing that I'll mention, and this is
03:41:50 24 just -- you know, I've used the word "trojan horse" both in
03:41:54 25 the briefs and today, but this is what the '042 patent, by

03:41:57 1 the way, is in this case for. They're not seeking damages
03:42:00 2 for the '042 patent. The '042 patent is the subject of a
03:42:03 3 summary judgment motion which I hope we have a chance to
03:42:05 4 argue later today, but I doubt it.

03:42:07 5 THE COURT: I don't think we will.

03:42:08 6 MR. ROSENTHAL: I doubt it.

03:42:09 7 But the '042 patent is in this case for this
03:42:13 8 reason and this reason alone, because it's the only link.
03:42:16 9 Mr. Chang just mentioned Dr. Wesel. He doesn't talk about
03:42:19 10 the '042 patent. And you heard and it's in their briefs,
03:42:24 11 the only allegation that this Russell thing has anything to
03:42:28 12 do with is the '042 patent. It's the only reason it's in
03:42:31 13 the case. And there's a reason for that, because the
03:42:34 14 technology that's accused of infringing the other two
03:42:36 15 patents wasn't even developed by Verizon. It was developed
03:42:40 16 by the phone manufacturers. Verizon had nothing to do with
03:42:44 17 the development of that.

03:42:44 18 So what they're talking about here is only with
03:42:47 19 respect to the '042. All of this is tied up with the '042.
03:42:50 20 And they don't have any evidence that anything that was
03:42:52 21 being presented has anything to do with the '042 patent.

03:42:56 22 THE COURT: I notice that the questions you
03:42:59 23 pointed out from the deposition are all focused on ItsOn
03:43:05 24 products, and it is apparent that Dr. Cooklev has not
03:43:11 25 examined the ItsOn products. The documents that we've been

03:43:17 1 looking at that Mr. Russell is involved with are about the
03:43:24 2 ItsOn technology.

03:43:24 3 MR. ROSENTHAL: Your Honor, the questions were not
03:43:26 4 limited to products. He specifically -- when I asked
03:43:29 5 him -- and it begins on Page 36. When I asked him about
03:43:34 6 this, he said, you know, what do you mean by the ItsOn
03:43:37 7 products?

03:43:38 8 So this is up here on Page 36, Line 6.

03:43:42 9 I said: Well, have you done any analysis of
03:43:45 10 whether anything that ItsOn did practiced the claims?

03:43:48 11 And he said: Well, one of the things that ItsOn
03:43:51 12 did was actually file the patent.

03:43:52 13 And so I clarified, and by the time we got to the
03:43:55 14 answer, he made it very clear. He said: I did not analyze
03:43:59 15 whether ItsOn's proposals or offerings -- proposals or
03:44:05 16 offerings.

03:44:06 17 Now, look, I don't need the deposition testimony
03:44:08 18 to make the point because his report simply does not do it.
03:44:13 19 His report simply does not ever look at the pages that
03:44:16 20 Mr. Chang put up on the screen and say here's how this
03:44:18 21 relates to the '042 patent or even state this relates to
03:44:25 22 the '042 patent.

03:44:26 23 He simply has 30 paragraphs where he recites the
03:44:29 24 facts that these things happened, and then says: In my
03:44:32 25 view, all of this supports the idea that we willfully

03:44:36 1 infringe one or more patents.

03:44:37 2 But he never has any analysis at all that this has
03:44:40 3 anything to do with the patent. That's just made up
03:44:43 4 attorney argument.

03:44:44 5 And I do think he clearly testified in his
03:44:48 6 deposition that he didn't perform any analysis of ItsOn
03:44:51 7 proposals or ItsOn products. And so what we're left with
03:44:58 8 is an -- and I will say one other thing. Mr. Russell --
03:45:02 9 and that's what this MIL is about. Mr. Russell made it
03:45:05 10 very clear that here's what he thinks happened. There's an
03:45:09 11 April 2010 presentation, and then later a gentleman named
03:45:12 12 Nem Kashanian put together a Verizon presentation, and he
03:45:15 13 saw some of the same concepts in that presentation.

03:45:18 14 And Mr. Russell testified unequivocally that never
03:45:21 15 went into any Verizon products. He said: That was a
03:45:23 16 proposal that never went anywhere. It didn't get
03:45:26 17 implemented. It's just a proposal. And he said: As long
03:45:28 18 as I was at the company, it never got implemented. And as
03:45:33 19 far as I know, it never got implemented when I left.

03:45:36 20 So this is -- this is just sexy. It has nothing
03:45:38 21 to do whether we actually took this stuff and put it into
03:45:42 22 our products, which we didn't.

03:45:43 23 So this is just so that they -- this is why the
03:45:46 24 '042 is in the case. It's why they're trying to get
03:45:49 25 this -- Mr. Russell testimony in is so that they can use

03:45:52 1 this word "copying" with the jury. But unless they tie it
03:45:56 2 to the '042 patent, it's not relevant.

03:45:59 3 And one last point, Your Honor, one last point.
03:46:04 4 When we moved for summary judgment of no copying on the
03:46:08 5 '042 patent, they didn't even raise this as evidence that
03:46:12 6 supports their claim of copying. If it's not relevant
03:46:16 7 enough for them to even raise it, then why should that form
03:46:19 8 a basis for them to get this allegation into the case?

03:46:23 9 That's all I have, Your Honor.

03:46:24 10 THE COURT: All right. Thank you, Mr. Rosenthal.

03:46:37 11 Mr. Chang, would you show me one more time the
03:46:41 12 portion of Dr. Cooklev's report that cited to the '042 in
03:46:46 13 connection with that part of his report that discusses the
03:46:53 14 ItsOn presentation?

03:46:58 15 MR. CHANG: Yes, Your Honor.

03:46:59 16 Okay. So I think Mr. Rosenthal keeps focusing on
03:47:46 17 products, products, products. The point here is, setting
03:47:52 18 that aside, the fact that Verizon elicited information
03:48:00 19 under an NDA -- proprietary ItsOn information under an NDA,
03:48:05 20 put that in its own presentation, and then, you know, the
03:48:11 21 evidence indicates that they then at least borrowed some of
03:48:16 22 the ideas to implement its own solution, which is called
03:48:18 23 the PCO solution, to address the very problems that are
03:48:22 24 described throughout the ItsOn presentations is relevant to
03:48:27 25 multiple issues in the case, including, for example,

03:48:30 1 long-felt need, recognition by one of the industries'
03:48:35 2 largest carriers, praise by others, copying, and so on.

03:48:44 3 So setting aside ItsOn's products and whether
03:48:51 4 Dr. Cooklev analyzed ItsOn products and tried to do a
03:48:56 5 mapping between ItsOn's products and '042, this is still
03:49:00 6 highly relevant to many issues in the case.

03:49:00 7 And so in Paragraph 90, again, he talks about
03:49:03 8 based on the timeline of events below, including its
03:49:06 9 discussion of the April 2010 presentation, this shows
03:49:10 10 Verizon would have been aware of or at least willfully
03:49:13 11 blinded itself to the '042 patent. And then he says in the
03:49:17 12 2016 time frame when Verizon defined its LTE PCO
03:49:24 13 requirements, because that's when it actually implemented
03:49:26 14 the PCO solution that we say was derived from the
03:49:30 15 information it got from ItsOn.

03:49:32 16 So the 2016 time frame point that Mr. Rosenthal
03:49:35 17 raised has nothing to do with the events that unfolded in
03:49:44 18 the 2010 timeframe when ItsOn presented that April
03:49:47 19 presentation to Verizon.

03:49:49 20 2016 is when Verizon ultimately adopted what's
03:49:54 21 called the PCO solution, that it actually started proposing
03:49:59 22 in documents beginning in 2012, just months after it
03:50:05 23 trialed the ItsOn software in 2011. And we can see that,
03:50:20 24 for example, in Paragraph 107.

03:50:22 25 By April 2012, Verizon identified specific network

03:50:25 1 congestion and customer experience issues that it had been
03:50:27 2 experiencing, some of the very issues Headwater and ItsOn
03:50:31 3 predicted would occur in their 2010 presentations to
03:50:34 4 Verizon. And then it gives some examples of a device
03:50:38 5 pinging issue. I mean, the similarities are remarkable.

03:50:44 6 And then it goes on: The solution that they
03:50:46 7 proposed in 2012 -- again, just months after the trial --
03:50:53 8 was a device-assisted services system that uses what's
03:50:58 9 called PCO to control network traffic using the device.
03:51:06 10 And this is one of the core concepts of the patented
03:51:11 11 technology.

03:51:11 12 THE COURT: All right. I'm also looking at
03:51:20 13 Document 185-3, which is excerpts of the same report of
03:51:26 14 Dr. Cooklev, and I'm satisfied that it shows that there is
03:51:35 15 an expert who is connecting the presentation at issue in
03:51:42 16 Mr. Russell's testimony with the technology in the '042
03:51:50 17 patent. And, therefore, I'll deny that part of Motion in
03:51:58 18 Limine No. 4.

03:52:01 19 And, Mr. Rosenthal, I would call on you to
03:52:08 20 identify for me what the agreement is that you said had
03:52:12 21 been reached on the other part of MIL 4.

03:52:17 22 MR. ROSENTHAL: Your Honor, do you mean to send an
03:52:19 23 email to the Court with that or to repeat it here?

03:52:22 24 THE COURT: If you think it is too much to
03:52:23 25 accurately dictate into the record, you can do it by email.

03:52:29 1 MR. ROSENTHAL: I'm happy to say it right now.

03:52:31 2 So what has been agreed is that there will be no
03:52:35 3 reference to the complaint that Mr. Russell filed against
03:52:41 4 Verizon.

03:52:42 5 There will be no reference to any retaliation that
03:52:46 6 Mr. Russell believes he was subjected to as a result of
03:52:49 7 that complaint or as a result of his whistle blowing, no
03:52:54 8 retaliation at all.

03:52:55 9 And there will be no reference to, quote, reverse
03:52:58 10 engineering that was part of his allegations.

03:53:03 11 And the only other comment I'll make, I understand
03:53:06 12 and appreciate the Court's ruling right now, is that we
03:53:09 13 would ask that that, of course, be revisited if the '042
03:53:12 14 does not go to trial.

03:53:14 15 THE COURT: All right.

03:53:15 16 MR. ROSENTHAL: Thank you, Your Honor.

03:53:16 17 THE COURT: Thank you.

03:53:18 18 MR. CHANG: Your Honor, just briefly. So we
03:53:21 19 agree -- Defendant -- I mean, Plaintiff agrees on the
03:53:25 20 agreed portion of what should get -- be excluded by the
03:53:30 21 MIL.

03:53:30 22 We disagree, however, that if the '042 patent --
03:53:34 23 for example, issues regarding the '042 patent are disposed
03:53:40 24 of in the case, that somehow that disposes of the evidence
03:53:46 25 that we've been discussing today.

03:53:49 1 THE COURT: Well, I'm not going to make a decision
03:53:51 2 on that at this time.

03:53:53 3 MR. CHANG: Okay. Sure. I appreciate that.
03:53:56 4 Thank you, Your Honor.

03:53:56 5 THE COURT: All right. That takes us to MIL
03:54:21 6 No. 5.

03:54:55 7 MR. ROBB: Ma'am, may I ask that the computer be
03:54:58 8 displayed? Thank you.

03:54:59 9 Thank you, Your Honor. Andrew Robb for
03:55:13 10 Defendants.

03:55:13 11 MIL No. 5 addresses a couple of issues relating to
03:55:18 12 damages numbers that are prejudicial.

03:55:20 13 I want to focus the presentation today on one of
03:55:23 14 those issues, which is the issue of post-judgment
03:55:27 15 royalties, and then I'll touch briefly on a couple of
03:55:30 16 others.

03:55:30 17 On the issue of post-judgment royalties, so for
03:55:35 18 context -- and I'll go briefly because I'm sure Your Honor
03:55:37 19 is familiar with it. Headwater's damages model relies on
03:55:40 20 three steps.

03:55:41 21 So first Dr. Wesel calculates the data savings
03:55:45 22 associated with devices that Verizon sells that use the
03:55:50 23 accused features.

03:55:51 24 Next, Dr. Bazelon calculates the total value of
03:55:57 25 the spectrum holdings of the Defendants. I'll note that

03:55:59 1 this MIL is almost identical between T-Mobile and Verizon,
03:56:03 2 so I'll just refer to Verizon. But the numbers are
03:56:05 3 slightly different, the arguments are precisely the same
03:56:08 4 for T-Mobile. He calculates the total value of Verizon's
03:56:11 5 spectrum holdings. He then determines the data savings
03:56:15 6 associated with the accused devices on a per-year basis and
03:56:19 7 calculates the value of those to the spectrum holdings,
03:56:24 8 again, on a per-year basis, running through the expiration
03:56:28 9 of the patents in 2029. He then sums those year-by-year
03:56:34 10 calculations into a single number, and that is his analysis
03:56:37 11 of the total value of the patents.

03:56:40 12 Mr. Bergman is their third expert. He's the final
03:56:45 13 damages expert. He simply takes that final total and
03:56:47 14 performs a 75/25 bargaining split where Headwater would get
03:56:52 15 25 percent of the value.

03:56:53 16 This is Dr. Bazelon's analysis. This is where he
03:56:59 17 is charting year-by-year for each year. Here is the
03:57:04 18 running value of the accused products that are being sold
03:57:12 19 as applied to the spectrum holdings.

03:57:14 20 To use one example on the right, he's assuming
03:57:18 21 that the '541 patent is infringed both with respect to
03:57:21 22 background app refresh and low data mode. And under that
03:57:24 23 assumption, he has the column on the right showing
03:57:28 24 year-by-year totals with the grand total at the bottom.
03:57:31 25 That's a straight summation of the year-by-year totals

03:57:35 1 above.

03:57:35 2 Mr. Bergman, as I indicated, takes those numbers.

03:57:40 3 They're different because they rely on different

03:57:43 4 assumptions, but you'll note the second number there is the

03:57:46 5 \$420 million number. That's just a straight copy from the

03:57:52 6 sums totals that Dr. Bazelon calculated. And he credits

03:57:58 7 Dr. Bazelon as calculating the overall value of the patent,

03:58:03 8 and then Mr. Bergman applies his bargaining split.

03:58:06 9 One more schedule to show the year-by-year running

03:58:10 10 total of the analyses that Dr. Bazelon and Mr. Bergman

03:58:13 11 performed. These are schedules to Mr. Bergman's report.

03:58:19 12 And in the first excerpt, we see -- the top right

03:58:23 13 is one of his total damages number that is simply the

03:58:27 14 summation of each of the years through 2029 that

03:58:31 15 Dr. Bazelon calculated, then, of course, with the

03:58:31 16 bargaining split.

03:58:36 17 He then calculates infringing units, that is the

03:58:39 18 total number of devices sold, and divides those two numbers

03:58:43 19 to come up with a per-unit royalty rate of [REDACTED].

03:58:47 20 In the second excerpt, he shows how he calculated

03:58:50 21 the infringing units, and it's small, and I apologize for

03:58:53 22 that, but in the very bottom, it says: Per Dr. Bazelon's

03:58:57 23 analysis, assumes 2024 to 2029, annual units equal 2023

03:59:03 24 figures.

03:59:04 25 So in calculating the number of devices sold, he

03:59:07 1 has actual numbers through 2023, and then he simply uses
03:59:12 2 those same numbers out through 2029 when the patent
03:59:18 3 expires.

03:59:19 4 Now, as Your Honor knows, because most of the
03:59:21 5 opinions I'm going to cite today were written by Your
03:59:24 6 Honor, there is a distinction in the law between lump sums
03:59:25 7 that allow you to capture the full value of the patent and
03:59:27 8 prohibitions against running royalties post-judgment.

03:59:30 9 This form of I'm going to have a year-by-year
03:59:35 10 total and then simply sum that at the end and declare it to
03:59:39 11 be a lump sum, Your Honor has already addressed this
03:59:42 12 precise issue in the Samsung I case.

03:59:46 13 So in the Samsung I case, Headwater's expert was a
03:59:49 14 gentleman by the name of Mr. Kennedy. Mr. Kennedy, one of
03:59:53 15 the components of his damages model was what he called a
03:59:56 16 post-judgment lump sum. To calculate the post-judgment
04:00:01 17 lump sum, he had a year-by-year schedule that he then
04:00:04 18 summed together. And there's no dispute -- and I have a
04:00:08 19 copy of the excerpt of Dr. Kennedy's -- Mr. Kennedy's
04:00:11 20 report. There's no dispute that it was a year-by-year,
04:00:15 21 column-by-column demonstration of the purported value of
04:00:20 22 the patents and that he then summed it and that he called
04:00:23 23 it a lump sum when doing so.

04:00:25 24 And Samsung called him on this. They said he's
04:00:30 25 not actually offering a lump-sum opinion. He's clearly

04:00:33 1 offering a running royalty disguised as a lump sum because
04:00:38 2 all he's doing is he's taking a running royalty and adding
04:00:40 3 them together at the end. He's simply summing them.

04:00:43 4 And Your Honor agreed. Your Honor agreed that
04:00:46 5 simply taking what is transparently a year-by-year running
04:00:52 6 royalty through post-judgment to the expiration of the
04:00:56 7 patent is clearly a running royalty post-judgment. That's
04:01:04 8 it.

04:01:04 9 Headwater in their opposition brief says, well,
04:01:08 10 Mr. Kennedy was not doing a lump sum. He was doing a
04:01:11 11 running royalty. And that's true, he was. But the point
04:01:16 12 is he tried to do exactly what Mr. Bergman is trying to do
04:01:20 13 here where he takes what is transparently a year-by-year
04:01:25 14 running royalty and then summing it and declaring it to be
04:01:28 15 a lump sum.

04:01:29 16 And that's precisely that -- the mere fact that
04:01:31 17 those numbers are summed does not magically convert them
04:01:36 18 into a lump-sum figure, particularly in light of the
04:01:38 19 problems associated with post-judgment running royalties
04:01:42 20 that this Court has repeatedly recognized, namely that
04:01:45 21 they're inherently speculative.

04:01:47 22 The case that Headwater cites, which is -- sorry,
04:01:56 23 my papers are out of order. Netlist -- Headwater cites
04:02:01 24 Netlist, draws the same distinction that a number of cases
04:02:05 25 have cited, which is that there's a difference between a

04:02:07 1 lump sum and a running royalty in that running royalties
04:02:07 2 post-judgment are not permissible. And that's true.

04:02:10 3 But Netlist never suggests that what Mr. Bergman
04:02:14 4 has done here, which is, again, take what is transparently
04:02:18 5 a running royalty post-judgment and sum those numbers
04:02:22 6 together and include it in the pre-judgment component,
04:02:26 7 converts that into a permissible lump sum.

04:02:29 8 The one other case that I'll draw Your Honor's
04:02:34 9 attention to is Allergan, which is Your Honor's opinion
04:02:43 10 from 2016. It is 2016 Westlaw 8222619.

04:02:52 11 That is notable for two reasons. First -- and
04:02:57 12 that case is a case where Your Honor excluded the
04:03:00 13 post-judgment component of a -- of a damages model that --
04:03:05 14 both pre-judgment and post-judgment on the basis that the
04:03:09 15 post-judgment portion was clearly just a running royalty,
04:03:11 16 even though in the first paragraph of the order, there was
04:03:15 17 an acknowledgement that the -- the post-trial damages range
04:03:23 18 from about 34 to \$57 million.

04:03:27 19 So there, too, there was a summation of the
04:03:29 20 running royalty. But simply taking a calculator and
04:03:32 21 combining a schedule does not convert it into what is a
04:03:36 22 proper damages analysis.

04:03:40 23 The other thing I'll note about this opinion,
04:03:44 24 Headwater makes an argument of waiver that we did not
04:03:46 25 include this argument in the opening Daubert briefs.

04:03:50 1 Now, as Your Honor knows, we did include it in the
04:03:53 2 reply Daubert briefs, but for purposes of this motion, that
04:03:56 3 is not relevant, because in Allergan, Your Honor held that
04:04:00 4 opinions on a future royalty that may accrue from
04:04:03 5 infringement that has not yet occurred is properly
04:04:07 6 excludable under Rule 702 as being contrary to law, not
04:04:10 7 helpful to the trier of fact -- so that, of course, is
04:04:13 8 Daubert -- or such an opinion is simply excludable under
04:04:17 9 Rules 401 and 402 as irrelevant.

04:04:21 10 And so the fact that we are presenting this in a
04:04:23 11 motion in limine as opposed to a Daubert ruling does not
04:04:26 12 mean that this is not relief that we can be entitled to.

04:04:31 13 I want to make -- whoops.

04:04:32 14 I want to make one other point very quickly. So
04:04:36 15 our motion identifies a number of prejudicial figures,
04:04:42 16 including industrywide totals, total revenue, et cetera.
04:04:46 17 Most of those Headwater has agreed that it will not
04:04:49 18 present.

04:04:49 19 The one dispute that remains on those is total
04:04:52 20 spectrum holdings. So this is an excerpt of Dr. Bazelon's
04:04:57 21 report in the Verizon case. He has summed what is in his
04:05:01 22 view the total value of Verizon's spectrum holdings at
04:05:06 23 \$155 billion. He then uses that as the starting point for
04:05:13 24 how he apports down to the ultimate value -- he does a
04:05:16 25 proration by year and then applies a distributed version of

04:05:22 1 Dr. Wesel's findings to come up with the total value.

04:05:25 2 Our expert disputes portions of this, in
04:05:29 3 particular the spectrum price, the megahertz per pop, which
04:05:29 4 is essentially -- think of it as the dollar per square
04:05:38 5 footage for spectrum. Our expert disputes that, and
04:05:40 6 there's a dispute between the parties about that.

04:05:43 7 The parties can have that dispute without this
04:05:45 8 total number being presented. This total number is
04:05:48 9 inherently prejudicial at \$155 billion. It's not necessary
04:05:52 10 for them to show this table or tables like it where they
04:05:56 11 talk about Auction 97 generated, you know, \$57 billion.
04:06:03 12 Right? These massive numbers are not necessary for the
04:06:06 13 schedule or don't need to be displayed to understand the
04:06:08 14 schedule. The relevant schedule is this one where the
04:06:12 15 numbers are still very large but not in the literally
04:06:17 16 hundreds of billions of dollars.

04:06:18 17 And so for that reason, we would ask that the
04:06:23 18 prejudicially high numbers relating to overall spectrum
04:06:27 19 auction results, company's overall spectrum holdings,
04:06:33 20 et cetera, would be excluded in addition to the large
04:06:35 21 numbers that Headwater has not asked to be excluded -- or
04:06:39 22 has -- sorry, has not opposed agreeing to not discuss.

04:06:43 23 THE COURT: So tell me again the numbers that you
04:06:52 24 say are left in dispute.

04:06:52 25 MR. ROBB: The numbers that are left in dispute.

04:06:52 1 So for purposes of what Dr. Bazelon did, which is -- he's
04:07:02 2 the one -- the middle step in Headwater's model, the
04:07:09 3 spectrum price, the dollar per megahertz-pop, which is
04:07:14 4 essentially the -- think of it as the value per square
04:07:20 5 footage of their spectrum. So Verizon has billions and
04:07:21 6 billions of spectrum holding units, and the two competing
04:07:25 7 spectrum experts look at FCC auction results and come up
04:07:29 8 with competing spectrum price per megahertz-pop.

04:07:34 9 So this 2.53 number that you see on the first row
04:07:38 10 is the disputed number. So our expert calculates it at
04:07:43 11 about \$1.10, which then translates to a much lower spectrum
04:07:45 12 value. But both our expert and their expert can make the
04:07:49 13 case simply by relying on the \$2.53 without ever showing
04:07:53 14 the \$98 billion or the \$155 billion. And I think the
04:07:59 15 prejudice associated with those numbers speaks for
04:08:02 16 themselves.

04:08:02 17 There are, of course, other inputs to the damages
04:08:07 18 models that the experts dispute. Dr. Wesel and Dr. Jeffay
04:08:12 19 dispute the data savings per hour. Multiple of our experts
04:08:16 20 and Dr. Wesel dispute how frequently the features are used.
04:08:19 21 So there are other disputes.

04:08:20 22 But for the purposes of spectrum, the one dispute
04:08:23 23 is the price per megahertz-pop of 2.53 versus, I believe,
04:08:30 24 it's \$1.10.

04:08:33 25 THE COURT: All right. There are three numbers

04:08:38 1 that you're seeking to exclude there, the spectrum value at
04:08:45 2 98 and 57 billion and the total at 155 billion. Those are
04:08:51 3 the three numbers that are still in dispute?

04:08:55 4 MR. ROBB: Your Honor, I'm so sorry. I have a
04:08:56 5 hearing problem. I couldn't hear you.

04:08:59 6 THE COURT: I'm sorry. I should have been closer.
04:09:01 7 On the screen now, you've got three large figures.
04:09:04 8 That's on your Slide 6.

04:09:06 9 MR. ROBB: Yes, Your Honor.

04:09:07 10 THE COURT: 98 billion, 57 billion, and 155
04:09:10 11 billion. Those are the numbers you're seeking to exclude?

04:09:15 12 MR. ROBB: So essentially, yes, with a couple of
04:09:19 13 caveats.

04:09:20 14 So, first, we have identified in our motion other
04:09:23 15 numbers, for example, total revenue of the company, total
04:09:28 16 industry revenue, total industry cost, et cetera.
04:09:32 17 Headwater, in their opposition brief, indicated they would
04:09:34 18 not oppose those. So those, I haven't addressed on the
04:09:38 19 understanding that Headwater is not opposing.

04:09:40 20 For the large spectrum numbers that Headwater is
04:09:43 21 opposing, it's the -- either broken out by category or the
04:09:48 22 sum total. So on this slide, it's 98,007,000,000, with a
04:09:55 23 footnote about why I'm saying that number, 57 billion, and
04:10:00 24 155 billion.

04:10:00 25 The reason I had the footnote, the T-Mobile and

04:10:00 1 Verizon reports are different on this issue in the sense
04:10:05 2 that T-Mobile has a much larger 2.5 gigahertz set of
04:10:09 3 holdings. And so for them, that number is in the billions.
04:10:13 4 And so we're not prejudiced by the \$7 million number, but
04:10:18 5 any of the large spectrum buckets or the total is, one, a
04:10:22 6 related category are total spectrum results from the FCC
04:10:28 7 auctions or from private sales.

04:10:30 8 So, for example, the -- there was an auction in
04:10:35 9 2021 which generated, I believe, over a hundred billion
04:10:43 10 dollars in revenue, I think. Certainly -- certainly over
04:10:44 11 \$50 billion. That total value that the whole industry paid
04:10:47 12 for that giant block of spectrum should be excluded for the
04:10:51 13 same reasons.

04:10:52 14 Again, the experts can do their disputes about how
04:10:54 15 to calculate the 2.53 versus \$1.10 numbers without
04:11:02 16 referring to the total amount at issue at that auction.

04:11:26 17 THE COURT: Where is that auction figure in your
04:11:27 18 motion?

04:11:28 19 MR. ROBB: Yes, Your Honor. So two notes here,
04:12:08 20 first, and I apologize for this. On Page -- so I'm looking
04:12:11 21 at the Verizon motion. On Page 14 of the motion, there's a
04:12:16 22 reference to Tables 5 and Table 6. That should be Tables 3
04:12:22 23 and Tables 4. Table 4 is what we're looking at now.

04:12:26 24 Second, in the next paragraph, there are examples
04:12:30 25 of citing, for example, the \$233 billion raised at FCC

04:12:37 1 auctions. So, again, the total amount raised at various
04:12:45 2 auctions individually or combined we think are
04:12:53 3 inappropriate.

04:12:54 4 THE COURT: All right. And as far as your
04:13:06 5 presentation on the running royalty issues you mentioned,
04:13:13 6 are those covered, as well, in your Daubert motion?

04:13:21 7 MR. ROBB: Your Honor, there was an inadvertent
04:13:25 8 error in our opening Daubert motion where we omitted this
04:13:28 9 argument. We inserted that into our reply brief, and they
04:13:28 10 had the opportunity to address it in the sur-reply. So we
04:13:31 11 think that there's no prejudice the fact that it was not
04:13:34 12 raised in the opening motion.

04:13:35 13 And, moreover, as I cited, this issue of
04:13:39 14 post-judgment running royalties under the law can be
04:13:42 15 addressed either in a motion in limine or a Daubert ruling.

04:13:48 16 THE COURT: So the relief that you're seeking with
04:13:51 17 respect to the running royalty issue, the future -- the
04:13:59 18 post-judgment running royalty, is what?

04:14:04 19 MR. ROBB: That that portion of the sum be
04:14:06 20 essentially truncated, cut off.

04:14:09 21 So here, where he's calculating transparently a
04:14:16 22 year-by-year running royalty where in the left-hand columns
04:14:20 23 we have the years, that in the middle of 2025, presuming
04:14:25 24 that's when judgment is entered, that essentially 2026
04:14:29 25 through 2029 would be excluded -- would not be included in

04:14:31 1 the summation because this is -- the reality of what he's
04:14:34 2 doing is he has two components. He has a pre-judgment and
04:14:38 3 a post-judgment component. And so the \$420 million number
04:14:38 4 on the right, as an example, would be reduced by the
04:14:46 5 summation of 2026 through 2029.

04:14:49 6 THE COURT: You know, the effect of that, I think,
04:14:54 7 would be that if the infringement continued, then the
04:15:04 8 Plaintiff would be entitled to seek a continuing royalty on
04:15:12 9 that by showing that whatever you have done post-judgment
04:15:18 10 is not colorably different than what you were found to have
04:15:24 11 done as infringement?

04:15:25 12 MR. ROBB: Your Honor, the -- how the parties
04:15:28 13 address that later, I think, is best suited to later.

04:15:32 14 But, for example, if after judgment Verizon
04:15:39 15 continues to infringe, then there would be a follow-on
04:15:43 16 action where presumably estoppel rules would apply. They
04:15:48 17 would have been adjudged to be an infringer for selling
04:15:52 18 precisely the same products, and they would get an
04:15:54 19 accounting on those products. Of course, if the products
04:15:57 20 change, if it turns out that Dr. Bazelon and Mr. Bergman's
04:16:00 21 analyses change, all that would change the numbers. Or if
04:16:04 22 the parties settle out of court, that would also be an
04:16:06 23 issue to be addressed there.

04:16:08 24 But the problem with including that here
04:16:11 25 prospectively is the inherently speculative nature of, as

04:16:17 1 the footnote indicates, simply taking the 2023 numbers and
04:16:23 2 writing them in in each of the subsequent years.

04:16:25 3 THE COURT: And does the Plaintiff's expert
04:16:27 4 contend that his analysis is a running royalty all the way,
04:16:33 5 or is he trying to take the position that he is arguing for
04:16:39 6 a lump sum before judgment and this running royalty
04:16:44 7 thereafter?

04:16:46 8 MR. ROBB: Your Honor, their experts contend that
04:16:49 9 this is a lump sum through the life of the patent.

04:16:53 10 Our point is that in the Samsung case,
04:17:00 11 Dr. Kennedy -- Mr. Kennedy had the very similar schedules
04:17:03 12 for post-judgment infringement, summed them together,
04:17:07 13 called them a lump sum to capture the full value, and
04:17:13 14 Your Honor said, no, that you can't -- you can't convert a
04:17:16 15 lump sum to -- sorry, you cannot convert a running royalty
04:17:23 16 into a lump sum simply by taking what is transparently a
04:17:28 17 running royalty and adding those numbers together.

04:17:30 18 THE COURT: All right. Thank you, Mr. Robb.

04:17:33 19 MR. ROBB: Thank you, Your Honor. If there's not
04:17:34 20 anything else, I'll rest.

04:17:41 21 MR. HOFFMAN: Your Honor, may I approach with some
04:17:43 22 slides?

04:17:44 23 THE COURT: Yes.

04:18:15 24 MR. HOFFMAN: Your Honor, Adam Hoffman for
04:18:17 25 Headwater.

04:18:17 1 So as we -- I think we see that these are -- this
04:18:22 2 MIL is two entirely separate motions, one of which has to
04:18:27 3 do with large numbers and one of which has to do with a
04:18:31 4 misrepresentation about what the experts' opinions are in
04:18:36 5 this case for Headwater.

04:18:38 6 Taking the large number part first. As I think
04:18:41 7 Your Honor saw here with a shifting recitation of what
04:18:46 8 large numbers are at issue and what aren't, saying that
04:18:50 9 certain tables were at issue in the motion and now certain
04:18:53 10 other tables are at issue in the argument, simply positing
04:19:00 11 that large numbers are bad is not an enforceable MIL. And
04:19:06 12 to the degree that there's a specific argument about a
04:19:08 13 specific document or number, those should be addressed on a
04:19:12 14 number-by-number basis.

04:19:14 15 The Federal Circuit held in Elbit, made very clear
04:19:18 16 that cases like Uniloc and LaserDynamics are not simply
04:19:23 17 rules that large numbers cannot be presented to the jury.
04:19:26 18 The Court has to look at the specific use in each of those
04:19:31 19 instances. And in particular, what's prohibited is using
04:19:36 20 the large numbers to make -- to argue that what's being
04:19:39 21 asked for in damages is a small portion of that.

04:19:43 22 They haven't presented any indication of any of
04:19:48 23 the experts making such an argument because they don't.
04:19:51 24 The numbers that are used are integral to their opinions
04:19:58 25 and necessary to explain how they calculate their opinions.

04:20:01 1 If we can go to the next slide, please.

04:20:04 2 So one of the numbers that apparently they are
04:20:07 3 trying to exclude is the amount that is -- the amount that
04:20:13 4 was obtained through FCC auctions. Dr. Bazelon was also a
04:20:20 5 witness -- expert witness in Finesse shown here. This
04:20:24 6 exact issue was addressed in Finesse. Because those
04:20:28 7 amounts of those auctions was the basis of his spectrum
04:20:34 8 savings model, it was relevant -- those numbers were
04:20:38 9 relevant to his calculations, and there was no --
04:20:43 10 therefore, no basis to say that he was using those numbers
04:20:46 11 simply to skew the horizon or to mislead the jury. He was
04:20:54 12 using them because they were the necessary evidence.

04:20:56 13 That's also the case here.

04:20:58 14 THE COURT: Good. Tell me how Dr. Bazelon is
04:21:00 15 using the spectrum value numbers and the spectrum auction
04:21:09 16 amounts.

04:21:10 17 MR. HOFFMAN: Okay. So Dr. Bazelon uses the
04:21:13 18 auction amounts, and he combines those with other FCC data
04:21:18 19 relating to populations in the -- populations and the
04:21:27 20 particular licenses granted to various parties to use
04:21:32 21 those -- the real-world evidence of the auction amounts to
04:21:35 22 calculate -- and I guess we can go to the next slide
04:21:39 23 because this was the one -- to calculate these numbers, the
04:21:43 24 spectrum price. Those are direct results of the input of
04:21:49 25 the FCC auction data and the population data. In other

04:21:54 1 words, the FCC auction data is the real-world evidence that
04:21:57 2 is the starting point and basis for his opinion.

04:22:01 3 The biggest dispute in this case between
04:22:05 4 Dr. Bazelon and their counter expert, Dr. Hazlett, is them
04:22:09 5 saying you used the wrong -- the wrong auctions. You
04:22:12 6 should have looked at these other auctions because the
04:22:14 7 auctions are the basis of the opinion.

04:22:16 8 So to say that the auction amounts are irrelevant
04:22:21 9 to his opinion or improper to present is to say that he's
04:22:24 10 unable to put into evidence the real-world evidence upon
04:22:29 11 which his opinion is based and which is, of course,
04:22:32 12 necessary to establish that his opinions are tied to the
04:22:35 13 evidence of the case.

04:22:36 14 The second point I'd like to make is that the
04:22:42 15 number here, the 155 billion number, that is the basis of
04:22:48 16 his calculation of spectrum savings.

04:22:51 17 If we can go to the next slide, please.

04:22:54 18 He uses a formula whereby he takes various inputs,
04:23:00 19 including Dr. Wesel's estimate of what the technical
04:23:05 20 benefit of the patents is, but also uses other percentages
04:23:09 21 to, for example, exclude instances where Verizon or
04:23:15 22 T-Mobile didn't sell the phone, the user brought their own
04:23:19 23 phone. He applies these various things to come up with an
04:23:22 24 overall factor, an overall percentage factor, which he then
04:23:26 25 applies to the spectrum value. In other words, the 155

04:23:31 1 billion, that is the number to which he applies his factor
04:23:35 2 analysis. And in the absence of that number, he is unable
04:23:41 3 to explain to the jury how he calculates any of his
04:23:45 4 numbers.

04:23:46 5 If you'll go to the next slide, please.

04:23:52 6 There's a claim here that this is a running
04:23:54 7 royalty. It's just not. There seems to be a position
04:23:58 8 taken by Verizon and T-Mobile in this case that lump sums
04:24:03 9 cannot be based on extent of use over time, even though
04:24:07 10 that's literally the law that that's what patent damages
04:24:11 11 are based on.

04:24:11 12 Dr. Bazelon annualized that 155 million (sic), in
04:24:19 13 other words, he broke it up over the years, because Verizon
04:24:24 14 obtained spectrum at different times. And also spectrum,
04:24:32 15 he wanted to -- as is required, he wanted to look at the
04:24:36 16 discount factor and the effect of the discount factor of
04:24:40 17 the value of that spectrum over time.

04:24:42 18 So he annualized that overall number to arrive at
04:24:46 19 a number for each year so that he can accurately both
04:24:49 20 reflect the extent of use and so that he can fairly give --
04:24:56 21 give the Defendants credit for the discount factor as
04:25:01 22 really he's required to do.

04:25:02 23 But this merely just shows the extent of use. And
04:25:07 24 then he does add up the various values over time and comes
04:25:14 25 up -- this is not a royalty, by the way. This is an

04:25:16 1 opinion on the value of the saved spectrum, the spectrum
04:25:20 2 that is saved directly incrementally as an effect of
04:25:25 3 infringement.

04:25:25 4 So I guess I'm at a loss at what an expert could
04:25:32 5 possibly do to have a lump sum that reflects accurately
04:25:40 6 changing value over time and extent of use over time,
04:25:43 7 because apparently if they break it up by year, according
04:25:47 8 to Defendant, they, therefore, can only have a running
04:25:49 9 royalty, because as Your Honor knows, particularly in this
04:25:53 10 court, where the opinion of the expert is that a lump
04:25:56 11 sum -- that that's a lump sum, and more importantly where
04:25:58 12 the jury awards a lump sum, that award is for the entire
04:26:03 13 life of the patent.

04:26:05 14 And to be very clear, all the experts in this case
04:26:10 15 opine on a lump sum. Nobody is opining on a reasonable
04:26:14 16 royalty. The only thing going to the jury is a lump sum.
04:26:16 17 If the jury awards a lump sum that ignores any post -- any
04:26:23 18 post-trial infringement, then that simply deprives
04:26:28 19 Headwater of the vast majority -- or not the vast majority,
04:26:34 20 of a significant portion of the damages that would be
04:26:36 21 considered -- should be considered and at the hypothetical
04:26:38 22 negotiation would, of course, be considered because at the
04:26:41 23 hypothetical negotiation all parties agree the parties
04:26:45 24 would be negotiating a license through the expiration of
04:26:48 25 the patents.

04:26:49 1 Another way to think of this is it's clear that
04:26:52 2 under this Court's precedence, that it is appropriate to
04:26:57 3 consider post-trial infringement and the resulting benefit
04:27:02 4 of that infringement as part of a lump-sum analysis. They
04:27:07 5 don't seem to dispute that.

04:27:09 6 How would that be possible -- according to them,
04:27:12 7 you can't look at that on a year-by-year basis. You can't
04:27:16 8 consider what that benefit is over years. You have to
04:27:17 9 somehow -- actually I don't even know what they're talking
04:27:19 10 about. You have to do projections without doing
04:27:22 11 projections by year, according to them, which just simply
04:27:25 12 isn't even possible.

04:27:26 13 This very clearly is nothing like the 422 case,
04:27:31 14 the Headwater I case. There, there was no dispute at all
04:27:35 15 that Dr. Kennedy was opining that the reasonable royalty in
04:27:40 16 the case was a running royalty. He never opined that the
04:27:44 17 reasonable royalty was a lump sum.

04:27:46 18 He opined that -- that if the Defendants argued
04:27:50 19 for a lump sum, that it is -- it would be necessary,
04:27:56 20 therefore, for the jury to consider future post-trial use,
04:28:02 21 and he therefore calculated that future use as a -- as a
04:28:07 22 sort of anticipatory rebuttal.

04:28:09 23 But that was not his opinion, and that's your
04:28:13 24 court excluded it, because you said you have a reasonable
04:28:18 25 royalty opinion, and you can't have a reasonable royalty

04:28:20 1 opinion and then also calculate post-trial damages.

04:28:24 2 THE COURT: I am going to defer that side of this
04:28:30 3 motion to the Daubert motion addressing the Plaintiff's
04:28:37 4 damages. So what I do want to discuss with you just is the
04:28:48 5 use of the figures that the Plaintiff is complaining about.
04:28:54 6 I'm looking at what is your Slide 6 on this MIL 5.

04:29:02 7 MR. HOFFMAN: Yes, Your Honor.

04:29:03 8 THE COURT: The one that has the 98, 7, and 57
04:29:07 9 adding up to 155.

04:29:12 10 Does Dr. Bazelon calculate those spectrum price
04:29:25 11 dollars per megahertz, whatever, at that level, or is it
04:29:32 12 calculated on many years that add up to what's shown on
04:29:36 13 Slide 6?

04:29:37 14 MR. HOFFMAN: He calculates it at this level, and
04:29:40 15 then he annualizes that number. He takes the 155 billion
04:29:45 16 and then spreads it over the years based on the extent of
04:29:49 17 use and based on the discount factor for the depreciation
04:29:54 18 of that value over time.

04:29:55 19 So then -- so this is -- this is the number he
04:30:03 20 gets from his analysis of the auction pricing and which he
04:30:08 21 then annualizes.

04:30:10 22 THE COURT: So tell me what -- all right. You're
04:30:19 23 looking -- I see. You're looking at a different slide than
04:30:22 24 I am.

04:30:23 25 MR. HOFFMAN: Yes, Your Honor. I think you were

04:30:24 1 referring to my Slide 4 when you were asking about the
04:30:27 2 98 million -- 98 billion --

04:30:28 3 THE COURT: It says 6 on the copy I'm looking at.

04:30:31 4 MR. HOFFMAN: Oh, I'm sorry, Your Honor.

04:30:33 5 But in any case, it should say Table 3 if that's
04:30:37 6 the one you were asking about. The numbering might have
04:30:49 7 gotten messed up. This is the one you were just asking
04:30:52 8 about, correct, Your Honor?

04:30:53 9 THE COURT: That is the one I was asking about.
04:30:55 10 So I don't understand how the numbers work on that to
04:30:59 11 generate the result. It looks like that's more of a
04:31:01 12 composite.

04:31:07 13 MR. HOFFMAN: Well, so because the auctions take
04:31:10 14 place for different bands, there's three different numbers
04:31:13 15 because there's different inputs in terms of the auction
04:31:16 16 prices for those different bands. So you have three
04:31:16 17 different numbers for the value of Verizon's holdings at
04:31:20 18 those three different bands. He then adds those together
04:31:23 19 to get the value of the total holdings.

04:31:25 20 He then -- if we can go to -- two slides forward.

04:31:29 21 THE COURT: Where does he get those numbers from,
04:31:32 22 the 98, the 7, and the 57?

04:31:35 23 MR. HOFFMAN: He gets them by deriving from the
04:31:41 24 auction price number the prior column for the megahertz-pop
04:31:49 25 number and then applying that to the extent of

04:31:51 1 infringement.

04:31:58 2 THE COURT: So why does he need to add it up to
04:32:01 3 those figures before breaking it down?

04:32:04 4 MR. HOFFMAN: Well, these are all, I think -- he's
04:32:07 5 a Ph.D. in economics and sometimes takes -- his
04:32:11 6 explanations are very complicated. My understanding is
04:32:15 7 that in his mind, the most accurate way in which to
04:32:17 8 determine this is to determine the total value and then
04:32:22 9 using that total value then annualize that value from that
04:32:28 10 starting point. I mean, that's his methodology.

04:32:30 11 And I think that goes to another issue here, which
04:32:37 12 is whether this is essentially a Daubert motion rather than
04:32:40 13 a MIL.

04:32:45 14 THE COURT: I'm just looking at whether he needs
04:32:49 15 to put that \$155 billion figure in front of the jury. And
04:32:54 16 I'm trying to understand the role it plays in his analysis.
04:32:58 17 But it appears that he's starting with it, not using it.

04:33:04 18 MR. HOFFMAN: I mean, you're correct, Your Honor,
04:33:06 19 in that it is a -- it is a starting point to which then
04:33:11 20 other apportionment factors are applied.

04:33:15 21 However, in explaining his opinion to the jury and
04:33:19 22 having the jury understand how he arrives at the numbers he
04:33:22 23 does and be able to evaluate the credibility of that to cut
04:33:27 24 out steps in his analysis undermines his ability to present
04:33:33 25 his opinion -- his entire opinion and to explain it fully

04:33:38 1 to the jury.

04:33:39 2 THE COURT: Where does his analysis start?

04:33:44 3 MR. HOFFMAN: It starts from the spectrum value at
04:33:51 4 the various bands, so the 98 billion, the 7 billion, and
04:33:55 5 the 57 billion, which added together is the total spectrum
04:33:59 6 value, which he then goes through a fairly complicated
04:34:04 7 calculation to take that total value and spread it over the
04:34:10 8 life of the patents, again, so he can take into account the
04:34:14 9 discount factor that reasonably would apply at the
04:34:19 10 hypothetical negotiation, as well as the time at which
04:34:24 11 Verizon and T-Mobile obtained that spectrum.

04:34:32 12 So I think Your Honor is correct in that
04:34:33 13 conceivably, he could start at Table 5-8, where -- starting
04:34:39 14 from the annualized numbers. But without able to -- he
04:34:43 15 wouldn't be able to explain to the jury how he gets there
04:34:47 16 from the auction pricing without explaining the
04:34:50 17 intermediary steps.

04:34:54 18 THE COURT: Well, what auction pricing is
04:34:56 19 reflected in that Table 3?

04:35:00 20 MR. HOFFMAN: Table 3 reflects -- as you can see,
04:35:03 21 there are footnotes there. So it reflects Auction 97 and
04:35:09 22 Auction 107. Those were two separate auctions for two
04:35:12 23 separate bands. And that's the source of the data which
04:35:17 24 when combined with population data he used to calculate the
04:35:21 25 spectrum price in the middle column there, the dollar per

04:35:26 1 megahertz per population.

04:35:42 2 So if you look at this, the Footnote 1 and 3 here,
04:35:45 3 that's the starting point of his analysis, the real-world
04:35:48 4 evidence of the market price for spectrum, which he then
04:35:52 5 uses to, through several steps, come up with the value --
04:35:59 6 the value of Defendants' spectrum.

04:36:15 7 THE COURT: All right. And the amounts raised in
04:36:18 8 the various spectrum auctions, which was the other issue
04:36:20 9 raised, those are numbers that he turns into these -- that
04:36:33 10 calculation in Footnote 2?

04:36:37 11 MR. HOFFMAN: I think Footnote 2 only refers to
04:36:40 12 that particular band where because there's -- there isn't
04:36:45 13 direct auction data, he kind of has to do some additional
04:36:47 14 calculations, and he explains what those are there.

04:36:51 15 This doesn't show the sort of formula of his
04:36:56 16 calculation for how he takes the input of the auction price
04:37:05 17 and from that calculation total value.

04:37:06 18 But I don't believe, Your Honor, that there's any
04:37:08 19 dispute that the starting point of his analysis and the
04:37:11 20 basis of his numbers, the real-world evidence upon which
04:37:15 21 his numbers are based are the auction pricing.

04:37:18 22 And, again, the main dispute between the experts
04:37:22 23 on this issue is not whether that's an unreasonable
04:37:30 24 starting point but whether he -- which auctions to look at,
04:37:36 25 that Dr. Bazelon believes that the two auctions shown here,

04:37:39 1 the 97 and the 107, are the most comparable and relevant
04:37:44 2 ones. And their expert, Dr. Hazlett, thinks that other
04:37:48 3 ones are more relevant. But they're both essentially
04:37:51 4 starting from the same place in terms of the kind of data
04:37:55 5 that they're looking at.

04:37:56 6 THE COURT: Dr. Bazelon's report is in the record
04:37:59 7 at -- as Exhibit 12; is that right?

04:38:03 8 MR. HOFFMAN: Your Honor, I don't have -- yes,
04:38:09 9 Your Honor, Exhibit 12.

04:38:10 10 And also I'd point out that not just this issue --
04:38:14 11 sorry, not just the issue about post-trial damages but
04:38:18 12 also -- or post-trial infringement but also this issue
04:38:21 13 that's specifically about this large number issue is also
04:38:23 14 addressed in the Daubert briefing.

04:38:27 15 So in Verizon, that's Docket 216 and 212, two
04:38:33 16 different ones because there's motions against both
04:38:36 17 Mr. Bergman and Dr. Bazelon. And in the T-Mobile case, at
04:38:40 18 Docket 205 and 209.

04:38:44 19 THE COURT: All right. And I'm going to carry MIL
04:38:49 20 No. 5 and look at it in connection with the Daubert and
04:38:55 21 with Dr. Bazelon's report and make a determination about
04:39:00 22 both issues.

04:39:01 23 MR. HOFFMAN: Thank you, Your Honor.

04:39:02 24 MR. ROBB: Your Honor, if I may, I don't have
04:39:05 25 anything of substance to say, but I'd like to offer

04:39:08 1 something.

04:39:08 2 THE COURT: All right.

04:39:09 3 MR. ROBB: I have with me excerpts of

04:39:13 4 Mr. Kennedy's report from the original Samsung case, which

04:39:17 5 is the basis of the ruling in that case that we think

04:39:19 6 applies here. If I could provide a copy to counsel and to

04:39:24 7 Your Honor?

04:39:26 8 THE COURT: All right.

04:39:43 9 MR. ROBB: Thank you, Your Honor.

04:39:51 10 MR. HOFFMAN: And, Your Honor, in terms of what

04:39:53 11 you've just been handed, I would just direct you to

04:39:56 12 Paragraph 433 on the first -- the first page which makes it

04:39:59 13 clear that what Dr. Kennedy was doing was not what

04:40:04 14 Dr. Bazelon was doing.

04:40:06 15 THE COURT: All right. I will consider that, as

04:40:07 16 well.

04:40:07 17 I'm going to grant the Defendants' motion for

04:40:13 18 leave to take up their sixth motion in limine, and I'd like

04:40:21 19 to hear from counsel about that now. I understand that

04:40:25 20 there is some measure of agreement, but I understand

04:40:31 21 Plaintiff has some concerns about it?

04:40:36 22 MR. GORHAM: Yes, Your Honor. Tom Gorham on

04:40:37 23 behalf of Defendants.

04:40:39 24 I'm pleased to announce that we worked out an

04:40:41 25 agreement over the lunch hour. If I may approach the bench

04:40:46 1 and hand up a paper that displays the structure of the
04:40:50 2 agreement. And I have a couple of additional comments, as
04:40:53 3 well.

04:40:54 4 THE COURT: All right.

04:40:55 5 MR. GORHAM: Thank you.

04:41:16 6 So, Your Honor, what I've handed up is Docket
04:41:20 7 Entry 262 in the 379 case. And in the right-hand column,
04:41:25 8 what is shown is Headwater's requested clarifications to
04:41:30 9 Defendants' proposed MIL No. 6.

04:41:33 10 And over the lunch hour, we met and conferred
04:41:37 11 about Headwater's proposed clarifications. We have agreed
04:41:42 12 with these clarifications with a few of -- a few additions
04:41:46 13 of our own.

04:41:47 14 And my question for Your Honor is how would you
04:41:49 15 like for us to present these to the Court for
04:41:51 16 implementation, if the Court is willing to do so? It might
04:41:55 17 be a little bit difficult to read the entirety of the
04:41:59 18 agreed-to MIL with the edits from the podium. And in lieu
04:42:07 19 of doing that, I'm happy to email the Court the language
04:42:09 20 that the parties have agreed to.

04:42:11 21 THE COURT: And the language that would be added
04:42:15 22 is what is handwritten on the copy of what was handed to
04:42:20 23 me?

04:42:21 24 MR. GORHAM: That's correct, and I've shown that
04:42:22 25 to opposing counsel before I approached the bench.

04:42:27 1 THE COURT: That is fine. Why don't you go ahead
04:42:29 2 and email that --

04:42:29 3 MR. GORHAM: Okay.

04:42:30 4 THE COURT: -- and we'll make sure that it gets
04:42:34 5 into the order on the MILs.

04:42:36 6 MR. GORHAM: Okay. And one comment -- perhaps two
04:42:42 7 comments on behalf of the Defendants as to what is driving
04:42:45 8 these edits, Your Honor.

04:42:47 9 Headwater's proposed clarification -- and I'm
04:42:51 10 looking now at the second proposed clarification -- asks a
04:42:55 11 party is permitted to question the opposing party's
04:43:00 12 corporate representative at trial regarding that opposing
04:43:02 13 party's positions taken in the litigation and at trial. It
04:43:08 14 was the language "the positions taken in the litigation at
04:43:12 15 trial" that Defendants thought was a little too broad --
04:43:15 16 actually a lot too broad.

04:43:16 17 So we proposed the two clarifications to narrow
04:43:19 18 the scope of that area for which Plaintiff is allowed to
04:43:24 19 question our corporate representative. And that was the
04:43:28 20 principal animating factor behind that edit, Your Honor.

04:43:34 21 THE COURT: All right. That it is relating to the
04:43:39 22 opposing party's high-level positions?

04:43:45 23 MR. GORHAM: Yes, exactly.

04:43:46 24 THE COURT: And regarding infringement,
04:43:49 25 invalidity, and damages?

04:43:50 1 MR. GORHAM: Yes, sir.

04:43:51 2 THE COURT: All right. I understand that.

04:43:55 3 MR. GORHAM: Thank you. I have nothing further,
04:43:56 4 and I will email the document to the Court. Thanks.

04:44:00 5 THE COURT: All right. Thank you, Mr. Gorham.

04:44:03 6 Obviously, we are not going to finish the exhibits
04:44:15 7 for the Verizon case, and we still have matters to take up
04:44:20 8 regarding T-Mobile. I'm not quite as worried about the
04:44:26 9 timing on the T-Mobile matters because I -- it is not going
04:44:30 10 to go to trial before Verizon.

04:44:32 11 I guess theoretically Verizon could settle and
04:44:39 12 leave T-Mobile first.

04:44:40 13 I'm looking at the people who would know that.

04:44:44 14 MR. ROSENTHAL: I think Verizon will go first,
04:44:46 15 Your Honor.

04:44:46 16 THE COURT: All right. I'm counting on that.

04:44:51 17 Then I've got a couple of options. We don't have
04:45:01 18 tremendous flexibility, but on Thursday and Friday of next
04:45:06 19 week, I've got time to take up the exhibits. It does not
04:45:12 20 require everybody to come back, just whoever you entrust
04:45:16 21 with the exhibit issues.

04:45:20 22 It looks like, frankly, the parties have gotten
04:45:25 23 the exhibits down to a fairly manageable number, and I will
04:45:31 24 make an effort to get a ruling out on the MILs that we have
04:45:37 25 taken under advisement, although not necessarily the ones

04:45:43 1 that are deferred to another substantive motion.

04:45:47 2 But if counsel want to consult their calendars and
04:45:54 3 let Ms. Asbel know before you leave here which of those two
04:46:00 4 days work best for you, and then we can at least finish up
04:46:05 5 the exhibits for Verizon and hopefully launch into issues
04:46:13 6 for the T-Mobile case, as well.

04:46:16 7 I am assuming that a lot of what we've done will
04:46:19 8 apply to the T-Mobile case, as well.

04:46:25 9 MR. DACUS: Your Honor --

04:46:25 10 THE COURT: Yes.

04:46:26 11 MR. DACUS: -- on the Thursday and Friday of next
04:46:27 12 week, I show on my calendar Friday of next week is the
04:46:33 13 AT&T-Headwater pretrial. Am I --

04:46:35 14 THE COURT: That's in the morning.

04:46:38 15 MR. DACUS: So that one will be done by noon?

04:46:43 16 MS. FAIR: Your Honor, if I may. We have spoken
04:46:46 17 with AT&T's counsel about whether it makes sense, because a
04:46:49 18 lot of the issues do overlap, to go ahead and finish the
04:46:52 19 Verizon issues before we get to AT&T. And so I don't
04:46:56 20 know -- we've floated this idea with everyone of
04:47:01 21 supplanting the AT&T pretrial next Friday with a
04:47:04 22 continuation of this hearing. I don't want to speak for
04:47:07 23 Verizon, T-Mobile, and AT&T on that, but from our
04:47:10 24 perspective, that would -- that would work just fine.

04:47:14 25 THE COURT: Well, I -- that makes sense.

04:47:17 1 Is that -- that would mean we have the day, and I
04:47:20 2 know we'd accomplish quite a lot.

04:47:24 3 MR. KREVITT: Your Honor, if we could just huddle,
04:47:26 4 as you suggested, on schedules --

04:47:26 5 THE COURT: Okay.

04:47:28 6 MR. KREVITT: -- because we have not had an
04:47:30 7 opportunity to consider that, and we'll --

04:47:32 8 THE COURT: All right.

04:47:32 9 MR. KREVITT: We understand Thursday and Friday
04:47:34 10 are available, and I'm sure we can make one of those work.

04:47:37 11 THE COURT: All right. Well, I know we had a
04:47:40 12 variety of other matters on the agenda, but I think we'll
04:47:43 13 just carry all of those over to next week.

04:47:47 14 And if you are able to arrive at a decision on the
04:47:50 15 date before you leave, that'd be helpful, and let us know.

04:47:56 16 MS. FAIR: Does that include the potential for
04:47:58 17 Friday morning if the parties are all agreeable to the
04:48:01 18 Verizon issues being taken up that morning, or is the Court
04:48:04 19 wanting to keep AT&T on calendar there?

04:48:06 20 THE COURT: I am quite willing to move it. And it
04:48:13 21 looks like I'm hearing from Mr. Saltz that we may have a
04:48:20 22 motion hearing in that case on that date. We would move
04:48:24 23 that, as well.

04:48:24 24 MS. FAIR: Yes. That would be something I think
04:48:25 25 we would contemplating moving, as well. I know that was

04:48:28 1 also part of what was set Friday morning. But since we
04:48:31 2 have counsel for all three of the carriers and Headwater
04:48:33 3 here, if the Court's amenable to being flexible, we can
04:48:37 4 reach an agreement and get with Ms. Asbel about that --

04:48:40 5 THE COURT: All right.

04:48:41 6 MS. FAIR: -- if that's all right with the Court?

04:48:43 7 THE COURT: Yes, I think that sounds good, and I
04:48:46 8 will let you confer.

04:48:47 9 Thank you.

04:48:47 10 MR. KREVITT: Thank you, Your Honor.

04:48:47 11 MR. ROSENTHAL: Thank you, Your Honor.

04:48:48 12 COURT SECURITY OFFICER: All rise.

04:48:49 13 (Hearing concluded at 4:48 p.m.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/S/ Shelly Holmes
SHELLY HOLMES, CSR, TCRR
CERTIFIED SHORTHAND REPORTER
State of Texas No.: 7804
Expiration Date: 10/31/2025

6/2/2025
Date